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# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912. 1913

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No. ~~22~~ 466

THE UNITED STATES, PETITIONER,

VS.

FREDERICK W. WHITRIDGE, AS RECEIVER OF THE  
THIRD AVENUE RAILROAD COMPANY ET AL.

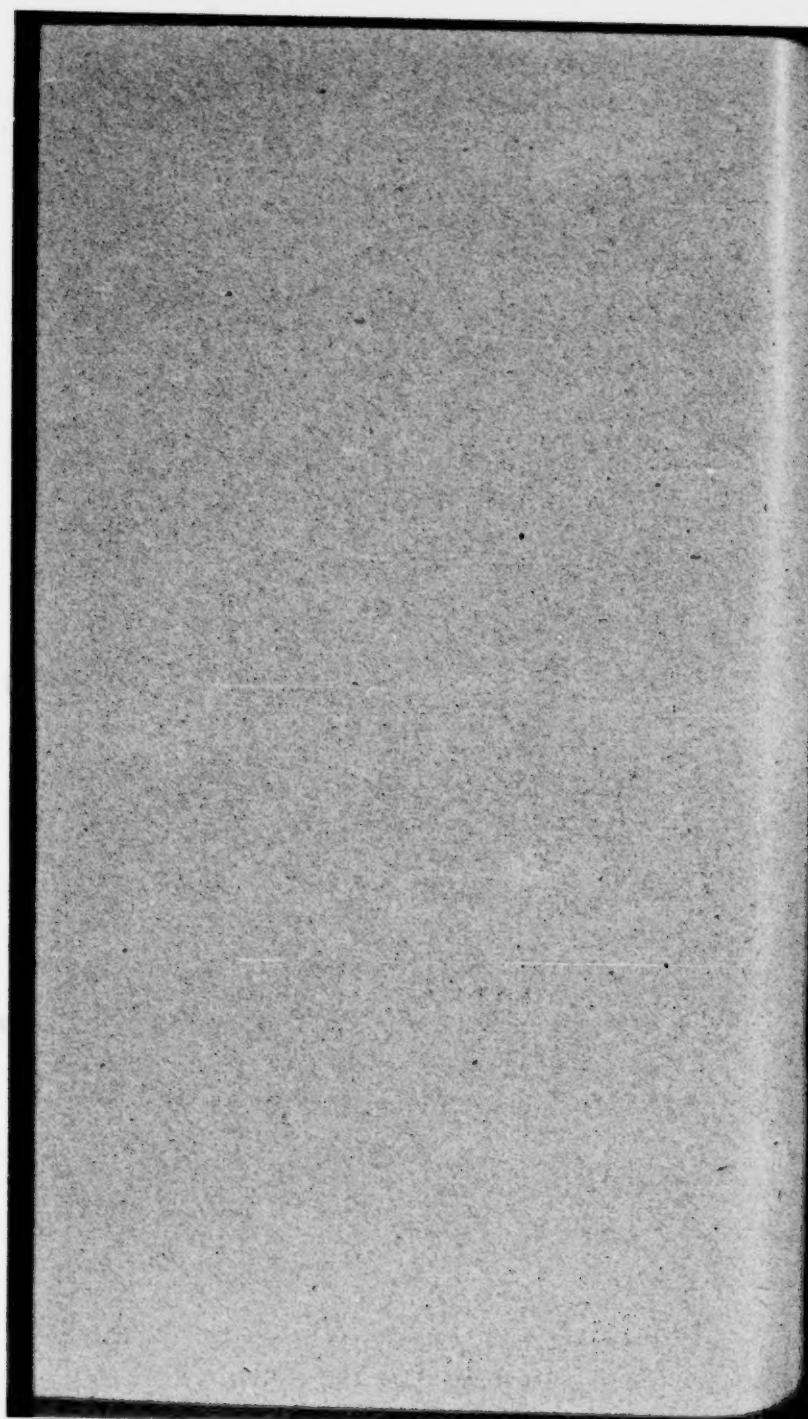
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR CERTIORARI FILED FEBRUARY 20, 1913.  
CERTIORARI AND RETURN FILED APRIL 31, 1913.

(23558)





# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 983.

THE UNITED STATES, PETITIONER,

vs.

FREDERICK W. WHITRIDGE, AS RECEIVER OF THE  
THIRD AVENUE RAILROAD COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT.

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A United States Circuit Court of Appeals for the Second Circuit.

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,

*v.*

THE THIRD AVENUE RAILROAD COMPANY, ADRIAN H. Joline and Douglas Robinson, as receivers, et al., defendants.

And three other cases.

In the matter of the application of the United States of America,  
appellant.

*Transcript of record.*

On appeal from the District Court of the United States for the  
Southern District of New York.

1 *Notice and allowance of appeal.*

United States District Court, Southern District of New York.

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,

*v.*

THE THIRD AVENUE RAILROAD COMPANY, NEW YORK City Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company, Metropolitan Street Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company, the Pennsylvania Steel Company, the Degnon Contracting Company, and Morton Trust Company, as trustee under the refunding mortgage, dated March 21, 1902, made by the Metropolitan Street Railway Company, defendants.

In equity.

AMERICAN HAY COMPANY, COMPLAINANT,

*v.*

DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD Company, defendant.

2 THE BARBER ASPHALT PAVING COMPANY, complainant,

*v.*

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. Nicholas Avenue Railway Company, defendant.

THE LORAIN STEEL COMPANY, COMPLAINANT,  
*v.*  
 UNION RAILWAY COMPANY OF NEW YORK CITY, DE-  
 fendant.

In the matter of the application of the United States of America for an order directing Frederick W. Whitridge, appointed receiver in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910, for the Third Avenue Railroad Company, Dry Dock, East Broadway and Battery Railroad Company, Union Railway Company of New York City, and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, of their and each of their net income to the collector of internal revenue for the district in which each of the said corporations had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909. (36 Stat. L., 112.)

SIRS: Please take notice that the petitioner herein, the United States of America, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final order and decree of the United States Circuit Court for the Southern District of New York, in the above-entitled proceeding, dated the 7th day of February, 1912, and entered in the office of the clerk of this court on the same day, and from each and every part of the said decree.

Dated, New York, April 30, 1912.

HENRY A. WISE,

*United States Attorney for the Southern District of New York, Solicitor for the Petitioner, office & P. O. address, room 50, U. S. Court and Post Office Building, Borough of Manhattan, City of New York.*

4 To

Thomas Alexander, Esq.,

Clerk of the U. S. District Court for the Southern District of New York.

Messrs. Bowers & Sands,

Solicitors for the Union Railway Company of New York City, Dry Dock, East Broadway and Battery Railroad Company, Central Trust Company of New York, as trustee, and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, 31 Nassau Street, New York City, N. Y.

Messrs. Davies, Auerbach, Cornell & Barry.

Solicitors for The Third Avenue Railroad Company, 32 Nassau Street, New York City, N. Y.

James L. Quackenbush, Esq.,

Solicitor for New York City Railway Company, 21 Park Row, New York City, N. Y.

J. Parker Kirlin, Esq.,

Solicitor for Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company and as receivers of Metropolitan Street Railway Company, 27 William Street, New York City, N. Y.

Messrs. Byrne & Cutcheon,

Solicitors for the Pennsylvania Steel Company and Degnon Contracting Company, 24 Broad Street, New York City, N. Y.

5 Bronson Winthrop, Esq.,

Solicitor for Morton Trust Company, as trustee, 32 Liberty Street, New York City, N. Y.

Messrs. Dexter, Osborne & Fleming,

Solicitors for William W. Ladd, as receiver of New York City Railway Company, 71 Broadway, New York City, N. Y.

Messrs. Guggenheimer, Untermeyer & Marshall,

Solicitors for American Surety Company, 37 Wall Street, New York City, N. Y.

Honorable Thomas Carmody,

Attorney General of the State of New York, 299 Broadway, New York, N. Y.

Daniel Burke, Esq.,

Solicitor for American Hay Company, 44 Pine Street, New York City, N. Y.

Henry M. Ward, Esq.,

32 Nassau Street, New York City, N. Y., and

Nathan Ottinger, Esq.,

60 Wall Street, New York City, N. Y.

Solicitors for Certified Holders Committee of the Dry Dock, East Broadway and Battery Railroad Company.

Messrs. Geller, Rolston & Horan,

Solicitors for Farmers' Loan and Trust Company, as trustee under the general first mortgage of the Dry Dock, East Broadway and Battery Railroad Company, and as successor to Morton Trust Company, as trustee under the mortgage of Metropolitan Street Railway Company, dated March 21, 1902, 20 Exchange Place, New York City, N. Y.

6 Messrs. Evarts, Choate & Sherman,

Solicitors for Frederick W. Whitridge, as receiver of The Third Avenue Railroad Company, Union Railway Company of New York City, and Dry Dock, East Broadway and Battery Railroad Company, 60 Wall Street, New York City, N. Y.

Messrs. Merrill & Rogers,

Solicitors for Frederick W. Whitridge, as receiver of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, 128 Broadway, New York City, N. Y.

Messrs. Kellogg & Rose,

Solicitors for Barber Asphalt Paving Company, 115 Broadway, New York City, N. Y.

Messrs. Miller, King, Lane & Trafford,

Solicitors for Union Trust Company of New York, as trustee, 80 Broadway, New York City, N. Y.

Messrs Stetson, Jennings & Russell,

Solicitors for the Lorain Steel Company, 15 Broad Street, New York City, N. Y.

Messrs. Eaton, Lewis & Rowe,

Solicitors for General Electric Company, 30 Church Street, New York City, N. Y.

Messrs. Cravath, Henderson & De Gersdorf,

Solicitors for Metropolitan Securities Company, 62 William Street, New York City, N. Y.

7 Honorable Archibald R. Watson,

Corporation counsel, city of New York, solicitor for the City of New York, Hall of Records, New York City, N. Y.

Samuel Bowman, Esq.,

Solicitor for United States Fidelity and Guaranty Co., 47 Cedar Street, New York City, N. Y.

Messrs. Guthrie, Bangs & Van Sinderen,

Solicitors for James M. Wallace, Adrian Iselin and Harry Bronner, 44 Wall Street, New York City, N. Y.

The foregoing appeal is hereby allowed.

Dated, April 30, 1912.

E. HENRY LACOMBE,  
*U. S. Circuit Judge.*

8

*Notice of motion.*

Circuit Court of the United States for the Southern District of New York.

In equity.

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,

*v.*

THE THIRD AVENUE RAILROAD COMPANY, NEW YORK City Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company, Metropolitan Street Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company, the Pennsylvania Steel Company, the Degnon Contracting Company, and Morton Trust Company, as trustee under the refunding mortgage dated March 21, 1902, made by the Metropolitan Street Railway Company, defendants.



AMERICAN HAY COMPANY, COMPLAINANT,

*v.*

DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY, defendant.

9 THE BARBER ASPHALT PAVING COMPANY, COMPLAINANT,

*v.*

THE FORTY-SECOND STREET, MANHATTANVILLE, AND ST. NICHOLAS AVENUE RAILWAY COMPANY, defendant.

In equity.

THE LORAIN STEEL COMPANY, COMPLAINANT,

*v.*

UNION RAILWAY COMPANY OF NEW YORK CITY, DEFENDANT.

In the matter of the application of the United States of America for an order directing Frederick W. Whitridge, appointed receiver in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910, for the Third Avenue Railroad Company, Dry Dock, East Broadway and Battery Railroad Company, Union Railway Company of New York City, and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, of their and each of their net income to the collector of internal revenue for the district in which each of the said corporations had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909. (36 Stat. L., 112.)

SIRS: Please take notice that upon the annexed petition of the United States of America, verified the 18th day of September, 1911, application will be made at a term of the United States Circuit Court for the Southern District of New York, to be held on the 27th day of September, 1911, in the United States courthouse and post-office building, in the Borough of Manhattan, city of New York, for an order directing Frederick W. Whitridge, Esq., appointed receiver in each of the four above-entitled actions, to make a true and accurate return for the years 1909 and 1910 for the Third Avenue Railroad Company, Dry Dock, East Broadway and Battery Railroad Company, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company and Union Railway Company of New York City, of their and each of their net income for the said years, to the collector of internal revenue for the third internal-revenue collection district of the State of New York, the district in which each of the said corporations had its principal

place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112), and for such other and further relief as justice may require.

Dated, New York, September 18, 1911.

Yours, etc.

HENRY A. WISE.

*United States Attorney for the Southern District of New York,  
Solicitor for Petitioner, Office and Post Office Address, Room 50,  
U. S. Courthouse and P. O. Bldg., Borough of Manhattan, City  
of New York.*

To

Messrs. Bowers & Sands,

Solicitors for the Union Railway Company of New York City,  
Dry Dock, East Broadway and Battery Railroad Company,  
Central Trust Company of New York, as trustee, and the  
Forty-second Street, Manhattanville and St. Nicholas Avenue  
Railway Company, 31 Nassau Street, New York City,  
N. Y.

Messrs. Davies, Auerbach, Cornell & Barry,

Solicitors for the Third Avenue Railroad Company, 32 Nassau  
Street, New York City, N. Y.

James L. Quackenbush, Esq.,

Solicitor for New York City Railway Company, 21 Park Row,  
New York City, N. Y.

12 J. Parker Kirlin, Esq.,

Solicitor for Adrian H. Joline and Douglas Robinson,  
as receivers of New York City Railway Company and as  
receivers of Metropolitan Street Railway Company, 27 Wil-  
liam Street, New York City, N. Y.

Messrs. Byrne & Cutcheon,

Solicitors for the Pennsylvania Steel Company and Degnon  
Contracting Company, 24 Broad Street, New York City, N. Y.

Bronson Winthrop, Esq.,

Solicitor for Morton Trust Company, as trustee, 32 Liberty  
Street, New York City, N. Y.

Messrs. Dexter, Osborne & Fleming,

Solicitors for William W. Ladd, as receiver of New York City  
Railway Company, 71 Broadway, New York City, N. Y.

Messrs. Guggenheimer, Untermeyer & Marshall,

Solicitors for American Surety Company, 37 Wall Street, New  
York City, N. Y.

Honorable Thomas Carmody,

Attorney General of the State of New York, 299 Broadway,  
New York City, N. Y.

Daniel Burke, Esq.,

Solicitor for American Hay Company, 44 Pine Street, New  
York City, N. Y.

- 13 Henry M. Ward, Esq.,  
32 Nassau Street, New York City, N. Y., and  
Nathan Ottinger, Esq.,  
60 Wall Street, New York City, N. Y., Solicitors for Certified  
Holders Committee of the Dry Dock, East Broadway and  
Battery Railroad Company.  
Messrs. Geller, Rolston & Horan,  
Solicitors for Farmers' Loan and Trust Company, as Trustee  
under the general first mortgage of the Dry Dock, East  
Broadway and Battery Railroad Company, and as succes-  
sor to Morton Trust Company, as Trustee under the Mort-  
gage of Metropolitan Street Railway Company, dated March  
21, 1902, 20 Exchange Place, New York City, N. Y.  
Messrs. Evarts, Choate & Sherman,  
Solicitors for Frederick W. Whitridge, as receiver of The  
Third Avenue Railroad Company, Union Railway Company  
of New York City, and Dry Dock, East Broadway and  
Battery Railroad Company, 60 Wall Street, New York  
City, N. Y.  
Messrs. Merrill & Rogers,  
Solicitors for Frederick W. Whitridge, as Receiver of The  
Forty-second Street, Manhattanville and St. Nicholas Ave-  
nue Railway Company, 128 Broadway, New York City,  
N. Y.
- 14 Messrs. Kellogg & Rose,  
Solicitors for Barber Asphalt Paving Company, 115  
Broadway, New York City, N. Y.  
Messrs. Miller, King, Lane & Trafford,  
Solicitors for Union Trust Company of New York, as trustee,  
80 Broadway, New York City, N. Y.  
Messrs. Stetson, Jennings & Russell,  
Solicitors for the Lorain Steel Company, 15 Broad Street,  
New York City, N. Y.  
Messrs. Eaton, Lewis & Rowe,  
Solicitors for General Electric Company, 30 Church Street,  
New York City, N. Y.  
Messrs. Cravath, Henderson & De Gersdorf,  
Solicitors for Metropolitan Securities Company, 62 William  
Street, New York City, N. Y.  
Honorable Archibald R. Watson,  
Corporation Counsel, City of New York, solicitor for the city  
of New York, Hall of Records, New York City, N. Y.  
Samuel Bowman, Esq.,  
Solicitor for United States Fidelity and Guaranty Co., 47  
Cedar Street, New York City, N. Y.  
Messrs. Guthrie, Bangs & Van Sinderen,  
Solicitors for James M. Wallace, Adrian Iselin and Harry  
Bronner, 44 Wall Street, New York City, N. Y.

Circuit Court of the United States, for the Southern District of New York.

In equity.

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,

*v.*

THE THIRD AVENUE RAILROAD COMPANY, NEW YORK City Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company, Metropolitan Street Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company, The Pennsylvania Steel Company, The Degnon Contracting Company, and Morton Trust Company, as trustee under the refunding mortgage dated March 21, 1902, made by the Metropolitan Street Railway Company, defendants.

AMERICAN HAY COMPANY, COMPLAINANT,

*v.*

DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD Company, defendant.

16 THE BARBER ASPHALT PAVING COMPANY, Complainant,

*v.*

THE FORTY-SECOND STREET, MANHATTANVILLE, AND St. Nicholas Avenue Railway Company, defendant.

In equity.

THE LORAIN STEEL COMPANY, COMPLAINANT,

*v.*

UNION RAILWAY COMPANY OF NEW YORK CITY, Defendant.

In the Matter of The Application of the United States of America for an order directing Frederick W. Whitridge, appointed receiver in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910, for The Third Avenue Railroad Company, Dry Dock, East Broadway and Battery Railroad Company, Union Railway company of New York City, 17 and The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, of their and each of their net income to the Collector of Internal Revenue for the District in which each of the said corporations had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909. (36 Stat. L., 112.)

*To the honorable judges of the Circuit Court of the United States for the Southern District of New York:*

The petition of the United States of America, appearing by Henry A. Wise, United States attorney for the Southern District of New York, its solicitor, respectfully shows to this honorable court, on information and belief, as follows:

First. That the Third Avenue Railroad Company, Dry Dock, East Broadway and Battery Railroad Company, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, and Union Railway Company of New York City are all corporations duly organized and existing under and by virtue of the laws of the State of New York, and in the years 1909 and 1910 they, and each of them, had, and still have, their principal places of business in the Borough of Manhattan, city, county, and State of New York, in the third internal revenue collection district of the State of New York.

18 Second. That the said The Third Avenue Railroad Company, Dry Dock, East Broadway and Battery Railroad Company, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, and Union Railway Company of New York City are all street railway corporations organized for profit prior to the year 1909, and having a capital stock represented by shares, and in the years 1909 and 1910 they were all engaged in business in the city, county, and State of New York.

Third. That on the 6th day of January, 1908, Frederick W. Whitridge, Esq., was duly appointed receiver of all the property, assets, etc., of the said The Third Avenue Railroad Company by an order of this court dated and entered on that day in the first above-entitled action, a copy of which said order is hereto annexed, marked Exhibit "A" and made part hereof, to which reference is hereby made for the terms of his appointment.

Fourth. That on the 1st day of February, 1908, the said Frederick W. Whitridge, Esq., was duly appointed temporary receiver of the said Dry Dock, East Broadway and Battery Railroad Company, its property, assets, etc., by an order of this court dated and entered on that day in the second above-entitled action, and that subsequently and on the 5th day of February, 1908, an order was duly made and entered therein continuing the said Frederick W. Whitridge, appointed temporary receiver as aforesaid, receiver during the pendency of the aforesaid action of the said company, its property, assets, etc., a copy of which latter order is hereto annexed marked Exhibit "B" and made part hereof, to which reference is hereby made for the terms of his appointment.

19 Fifth. That on the 1st day of February, 1908, the said Frederick W. Whitridge, Esq., was duly appointed temporary receiver of the said The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, its property, assets, etc., by an order of this court dated and entered on that day in the

third above-entitled action, and that subsequently and on the 5th day of February, 1908, an order was duly made and entered therein continuing the said Frederick W. Whitridge, appointed temporary receiver as aforesaid, receiver during the pendency of the aforesaid action of the said company, its property, assets, etc., a copy of which latter order is hereto annexed, marked Exhibit "C" and made part hereof, to which reference is hereby made for the terms of his appointment.

Sixth. That on the 31st day of March, 1908, the said Frederick W. Whitridge, Esq., was duly appointed temporary receiver of the said Union Railway Company of New York City, its property, assets, etc., by an order of this court dated and entered on that day in the fourth above-entitled action, and that subsequently and on the 6th day of April, 1908, an order was duly made and entered therein continuing the said Frederick W. Whitridge, appointed temporary receiver as aforesaid, receiver during the pendency of the aforesaid action of the said company, its property, assets, etc., a copy of which latter order is hereto annexed, marked Exhibit "D" and made part hereof, to which reference is hereby made for the terms of his appointment.

Seventh. That each of the said railway companies, except the Third Avenue Railroad Company, by order duly made and entered in the respective above-entitled actions, was duly adjudged and decreed to be insolvent, and its assets and property were ordered, adjudged, and decreed to constitute a fund for the benefit of the creditors of each of the said companies, and its assets were ordered and decreed to be marshalled for the benefit of said creditors, and that in the first above-entitled action a final decree of foreclosure was duly entered ordering the sale of all the mortgaged property of the said The Third Avenue Railroad Company, of which the said Frederick W. Whitridge had been appointed receiver as aforesaid.

Eighth. That the said Frederick W. Whitridge, Esq., duly appointed receiver in each of the above-entitled actions as aforesaid, immediately upon his appointment took possession of all the assets and property of each of the said railway companies of every kind and nature whatsoever, and has ever since remained in possession thereof, and has acted and continued to act, during the years 1909 and 1910 and ever since, pursuant to the terms of each of the said orders appointing him such receiver since the respective dates of entry thereof, and during the years 1909 and 1910 and ever since the business of said companies has been done, performed, and carried on by the said Frederick W. Whitridge as such receiver, his agents, employees, servants, etc., and by them alone.

Ninth. That each of the said railway companies became subject by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L. 112), to pay annually to the United States of America a special excise tax with respect to the carrying on or doing business by such corporation, and was required to make, on or before the first days of March, 1910 and 1911, a true and accurate



21 return to the collector of internal revenue for the district in which each of the said companies had its principal place of business in the manner and form required by the provisions of the said section.

Tenth. That by virtue of the appointment in each of the above-entitled actions of Frederick W. Whitridge as receiver as aforesaid, of each of the said railway companies, their assets, property, etc., the said receiver took the place of the directors and officers of the said companies during the pendency of the above-entitled actions to the same effect and with the same liabilities, obligations, and duties as were and are imposed by law upon such directors and officers of each of said companies, and more particularly by the provisions of the said section.

Eleventh. That the said receiver has wholly failed and neglected and refused to file a true and accurate return, or any return, of said railway companies and of each of them, as required by the provisions of the said section, for the years 1909 and 1910, and still refuses so to do.

Twelfth. That the said The Third Avenue Railroad Company made a statement in the nature of the true and accurate return required by the provisions of the said section to the collector of internal revenue for the third district aforesaid, verified on the 16th day of February, 1910, by Charles Remsen, president, and John N. Perry, treasurer, a copy of which statement in the nature of the return aforesaid is hereto attached and made a part hereof, marked Exhibit "E," to which reference is made as if herein at length set forth.

22 Thirteenth. That the said Dry Dock, East Broadway and Battery Railroad Company made a statement in the nature of the true and accurate return required by the provisions of the said section to the collector of internal revenue for the third district aforesaid, verified on the 19th day of February, 1910, by Arthur Coppel, president, and George W. Davison, treasurer, a copy of which statement in the nature of the return aforesaid is hereto attached and made a part hereof, marked Exhibit "F," to which reference is made as if herein at length set forth.

Fourteenth. That the said The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company made a statement in the nature of the true and accurate return required by the provisions of the said section to the collector of internal revenue for the third district aforesaid, verified on the 19th day of February, 1910, by Franklin L. Babcock, president, and George W. Davison, treasurer, a copy of which statement in the nature of the return aforesaid is hereto attached and made a part hereof, marked Exhibit "G," to which reference is made as if herein at length set forth.

Fifteenth. That the said Union Railway Company of New York City made a statement in the nature of the true and accurate return required by the provisions of the said section to the collector of internal revenue for the third district aforesaid, verified on the 17th day of February, 1910, by Edward A. Maher, president, and Reune

Martin, treasurer, a copy of which statement in the nature of the return aforesaid is hereto attached and made a part hereof, marked Exhibit "H," to which reference is made as if herein at length set forth.

Sixteenth. That none of the said railway companies made a true and accurate return, under oath or affirmation of any of its officers, of its net income for the year ending December 31, 1910, or any return whatever, or any statement in the nature of a true and accurate return, as required by the said section, to the collector of internal revenue for the third district aforesaid, or to any other collector, on or before the 1st day of March, 1911, or at any other time.

Wherefore deponent prays that an order be made by this court, in each of the four above-entitled actions, directing and requiring the said Frederick W. Whitridge, as receiver as aforesaid of each of the said railway companies, to make a true and accurate return, as required by the provisions of section 38 of the said act of Congress, of their and each of their annual net income for the years ending December 31, 1909, and December 31, 1910, and that your petitioner may have such other and further relief in the premises as may be just and proper; and your petitioner will ever pray, etc.

HENRY A. WISE,

*United States Attorney for the Southern District of New York,  
Solicitor for Petitioner, Office and P. O. Address, U. S. Court  
House and Post Office Building, New York, N. Y.*

SOUTHERN DISTRICT OF NEW YORK,

*State of New York, County of New York, ss:*

J. Neville Boyle, being duly sworn, deposes and says that he is an assistant United States attorney for the southern district of New York, the solicitor for the petitioner herein. Deponent further says that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

The sources of deponent's information and the grounds for his belief as to all the matters not stated in the said petition on his knowledge are statements made to deponent by M. S. Borland, an attorney, in the office of Bowers & Sands, solicitors herein, and by Frederick W. Whitridge, Esq., receiver, and correspondence in the possession of deponent between the solicitor for the petitioner and the Commissioner of Internal Revenue, and Frank L. Marshall, collector of internal revenue for the third district of New York.

J. NEVILLE BOYLE.

Sworn to before me this 18th day of September, 1911.

FRED. L. CAMPBELL,  
*Notary Public, Kings County.*

Certificate filed in New York County.

## "EXHIBIT A."

Circuit Court of the United States for the Southern District of New York.

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,  
*against*

THE THIRD AVENUE RAILROAD COMPANY; NEW YORK City Railway Company; Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company; Metropolitan Street Railway Company; Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company; the Pennsylvania Steel Company; the Degnon Contracting Company; and Morton Trust Company, trustee under refunding mortgage dated March 21st, 1902, made by the Metropolitan Street Railway Company, defendants.

This cause came on this day to be heard on motion of the complainant for the appointment of a receiver as prayed in the bill of complaint.

On said bill of complaint, after hearing John M. Bowers, Esq., for complainant, and Abram I. Elkus, Esq., and C. H. Williams, Esq., having been heard on behalf of certain bondholders, and Edward M. Shepard, Esq., having been heard, without appearing, on behalf of certain stockholders, and Robert Kernan, Esq., having appeared, but not opposing, on behalf of the defendant The Third Avenue Railroad Company, and Masten & Nichols, Esqrs., having appeared, but not opposing, on behalf of the defendants, Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company and also as receivers of the Metropolitan Street Railway Company, and J. Parker Kirlin, Esq., having appeared, but not opposing, on behalf of the Metropolitan Street Railway Company, and Byrne & Cutcheon, Esqrs., Elihu Root, jr., of counsel, having appeared, but not opposing on behalf of the defendant The Pennsylvania Steel Company, and the Degnon Contracting Company, and Winthrop & Stimson, Esqs., Bronson Winthrop, Esq., of counsel, having appeared, but not opposing, on behalf of the defendant, Morton Trust Company, as trustee, as aforesaid and notice of this application having been duly given to the Third Avenue Railroad Company, New York City Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company, Metropolitan Street Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company, the Pennsylvania Steel Company, the Degnon Contracting Company, and the Morton Trust

Company, trustee under refunding mortgage dated March 21st, 1902, made by the Metropolitan Street Railway Company, it is,

On motion of John M. Bowers, Esq., solicitor for the complainant,

Ordered, adjudged, and decreed that Frederick W. Whitridge, Esq.,

of New York, be, and he hereby is, appointed under the bill of  
27 complaint in this cause receiver of all the railroads, properties,  
and premises, real, personal, and mixed, of whatsoever kind  
and description and wheresoever situated, including all railroads  
owned, leased, or operated by said defendant The Third Avenue  
Railroad Company, all tracks, terminal facilities, offices, shops, and all  
buildings and appurtenances of every kind, all cars and other rolling  
stock and equipment, tools, machinery, furniture, fixtures, materials  
and supplies, books of account, records, and other books, papers, and  
accounts, cash in bank, on deposit and in hand, money, debts, things  
in action, credits, deeds, leases, contracts, muniments of title, rents,  
issues, and profits and income accruing and to accrue, as well as all  
interests, easements, privileges, franchises, and assets of all and every  
kind, mortgaged and pledged under the mortgage dated May 15th,  
1900, made by the defendant The Third Avenue Railroad Company,  
to the Morton Trust Company, as trustee, and under which the com-  
plainant has been duly substituted and appointed and is now trustee,  
and described in the bill of complaint in this cause, and of all the  
tolls, earnings, income, rents, issues, and profits of said railroad,  
property, and premises; provided, however, that complainant shall be  
entitled to retain possession and exercise any powers appertaining to  
any stocks, bonds, or securities pledged under such mortgage, the  
possession of which the complaint has or is entitled to thereunder;  
that said receiver be, and he hereby is, authorized to run, manage, and  
operate the said railroads and properties, to collect the rents, income,  
tolls, issues, and profits of said railroads and property, to exercise the  
authority and franchises of said defendant, and discharge its public  
duties, acting in all things subject to the supervision of this court,  
and shall have power to borrow money in his judgment need-  
28 ful to pay current necessities for labor and supplies and for  
no other purpose, without the further order of this court.

And it is further ordered, adjudged, and decreed that the said  
receiver be, and he hereby is, authorized in his discretion to employ  
and discharge and fix the compensation of all attorneys, managers,  
superintendents, agents, and employees, and to make such payments  
and disbursements as may be needful and proper in so doing, and to  
preserve and protect its railroad system in proper condition and  
repair, and to protect the title and possession, and that the said  
receiver be, and he hereby is, fully authorized and empowered to insti-  
tute and prosecute in his own name or in the name of the said The  
Third Avenue Railroad Company all such suits as may be necessary  
in his judgment for the proper protection of the trust estate, and the  
discharge of his trust, and likewise to defend all actions instituted

against him as receiver, and also to appear in and continue or defend any suits now pending in any court to which said defendant The Third Avenue Railroad Company, is a party, the continuation or defense of which will, in the judgment of said receiver, be necessary for the proper protection of the trust estate.

And it is further ordered, adjudged, and decreed that the said receiver be, and he is hereby, authorized in his discretion, from time to time, out of the funds coming into his hands, to pay the expenses of operating the said properties and executing his trusts, and to make such repairs to said properties and premises as in his judgment may be necessary in order safely to conduct said operation under this order. And said receiver is likewise authorized in his discretion, from time to time, out of the funds coming into his hands, to pay any prior lien or liens existing against the property that may come into his possession, or existing against any of the properties  
29 represented by the stocks, bonds, or securities pledged under said mortgage, or the interest on any of such lien or liens.

The said receiver is hereby required to open proper books of account, wherein shall be stated the earnings, expenses, receipts and disbursements of his said trust, and preserve proper vouchers for all payments made by him on account thereof.

It is further ordered that the bond of the said receiver in the sum of one hundred thousand dollars, conditioned that he will well and truly perform the duties of his office and duly account for all moneys or properties which may come into his hands, and abide by and perform all things which he shall be directed to do, with sufficient sureties, to be approved by a judge of this court, be forthwith filed in the office of the clerk of this court.

And it is further ordered that all officers, directors, agents, and employees of the defendant The Third Avenue Railroad Company, be, and they are and each of them is hereby, required and commanded, upon demand of said receiver, or his duly authorized agent, to turn over and deliver to said receiver, or his duly constituted representative, any and all of the said property in their hands or under their control or the control of any of them.

And it is further ordered that the receiver hereby appointed shall, with all reasonable despatch, make and enter into such arrangements for an operating force and for power and other administrative necessities as will enable him to conduct the operation of the said railroads and property with due regard to public convenience and without delays or interruption in the service; and when and as soon as such arrangements shall have been approved by the order of this court,

then the said Adrian H. Joline and Douglas Robinson, re-  
30 ceivers, shall, upon demand of the receiver hereby appointed, turn over and deliver to said receiver, or his duly constituted representative, all the property in their hands or under their control, mentioned and described in the bill of complaint herein, and shall, under the order and direction of the court, account to the receiver

hereby appointed for any and all moneys received by them from said properties from and after the date of the entry of this order, over and above the necessary expenses of their operation, which is without prejudice to any other accounting any party shall be entitled to demand.

And this court reserves full jurisdiction to retake possession of the property through its receivers heretofore appointed, as in the bill of complaint set forth, in the event that within three months from January 1st, 1908, the entire rental under and pursuant to the provisions of the lease made by the Third Avenue Railroad Company to the Metropolitan Street Railway Company, dated April 13th, 1900, is paid; and likewise retains such jurisdiction for the purpose of adjusting any questions that may arise between the said Adrian H. Joline and Douglas Robinson, receivers, and the said Frederick W. Whitridge, by this order appointed receiver, or for determining any question affecting either of said receiverships, or for determining any question in any action now pending in this court in which said receivers were appointed, or for any other purpose.

And said defendant The Third Avenue Railroad Company, its officers, directors, agents, and employees, and all other persons claiming to act by, through, or under said defendant, and all other  
31 persons whatsoever, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties, and any party in interest may apply for further direction.

Dated, New York, January 6th, 1908.

E. HENRY LACOMBE,  
U. S. Cir. J.

"EXHIBIT B."

In the Circuit Court of the United States for the Southern District of New York.

AMERICAN HAY COMPANY, COMPLAINANT,	}
<i>against</i>	
DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD Company, defendant.	

And now on this 5th day of February, 1908, this cause came on further to be heard upon the pleadings and upon the order made in this cause on the first day of February, 1908, directing that the parties hereto show cause why the receivership of the Dry Dock, East Broadway and Battery Railroad Company and of its property should not be continued during the pendency of this suit, and thereupon  
32 after hearing Henry M. Ward, of counsel for complainant, Latham G. Reed, of counsel for defendant, Dry Dock, East Broadway and Battery Railroad Company, and George W.



Davison, of counsel for defendant, Central Trust Company of New York:

It is ordered, adjudged, and decreed, that the defendant, Dry Dock, East Broadway and Battery Railroad Company, is insolvent and that its assets and property of every description constitute a fund in which the complainant and other creditors of the said defendant corporation are interested, and that the assets of said corporation should be marshalled and the extent of the rights, liens, equities, and priorities of the several creditors should be ascertained and decreed by the court; and it is further

Ordered, adjudged, and decreed, that Frederick W. Whitridge, Esq., heretofore by said order of February 1st, 1908, appointed temporary receiver of said defendant, Dry Dock, East Broadway and Battery Railroad Company, and of the property of the defendant, be continued as receiver, during the pendency of this suit, of said defendant, and of all the property of the said defendant, real, personal, and mixed, of whatsoever kind and description and wheresoever situated, including all railroads, owned, leased or operated by said defendant, all tracks, terminal facilities, offices, shops, and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, materials, and supplies, books of account, records, and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muni-  
33 ceiver be, and he hereby is, authorized to run, manage and operate said railroads and properties, to collect the rents, income, tolls and profits of the said railroad property, and to exercise the authority and franchises of said defendant, and discharge its public duties, acting in all things subject to the supervision of this court; and it is further

Ordered, adjudged, and decreed, that the said receiver be, and he hereby is, authorized, in his discretion, to employ and discharge and fix the compensation of all attorneys, managers, superintendents, agents, and employees, and to make such payments and disbursements as may be needful and proper in so doing. That the said receiver be, and he hereby is, authorized to institute and prosecute, in his own name or in the name of Dry Dock, East Broadway and Battery Railroad Company, all such suits as may be necessary, in his judgment, for the proper protection of the trust estate and the discharge of his trust, and likewise to defend all actions instituted against him as receiver, and also to appear in and continue or defend any suits now pending in any court to which said defendant, Dry Dock, East Broadway and Battery Railroad Company, is a party, the continuance or defense of which will, in the judgment of said receiver, be necessary for the proper protection of the trust estate

or the interests and rights of creditors connected therewith; and it is further

Ordered, adjudged, and decreed, that said receiver be, and he is hereby, authorized, in his discretion, from time to time, out of the funds coming into his hands, to pay the expenses of operating the said properties and of executing his trusts, and to make such repairs to said properties and premises as, in his judgment, may be necessary in order safely to conduct operations under this order;

34 also, with the approval of this court, to pay all taxes and assessments upon the said properties or any part thereof, and all such rentals and installments as may fall due or become due for the use of any portion of said railroad and other property, and also to pay and discharge the current and unpaid pay-rolls incurred in the operation of said railroad at any time within four months prior to his appointment, and also to pay and discharge the supply and construction accounts incurred in the operation of said railroad, and all such other claims arising from the previous operation of said property as, in his judgment, on examination, are proper to be paid as expenses of operation, provided that no payment of such accounts or claims shall be made without the express order of this court.

The said receiver is hereby required to open proper books of account, wherein shall be stated the earnings, expenses, receipts, and disbursements of his said trust, and preserve proper vouchers for all payments made by him on account thereof; and it is further

Ordered, that each and every of the officers, directors, agents, and employees of the defendant, and all other persons whomsoever, be, and they are hereby, required and commanded forthwith, upon demand of said receiver or his duly authorized agents, to turn over and deliver to said receiver, or his duly constituted representative, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, or other property in his or their hands or under his or their control.

And the defendant, Dry Dock, East Broadway and Battery Railroad Company, and its officers, directors, agents, and employees, and all other persons claiming to act by, through, or under the defendant, and all other persons whomsoever, are hereby enjoined

35 from interfering in any way whatever with the possession or management of any part of the property over which the receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties or his operating the same, and any party in interest may apply for further directions; and it is further

Ordered, that the bond in the sum of fifty thousand dollars heretofore given by said receiver for the faithful performance of his duties and filed in this cause stand, and be, and the said bond hereby is, approved.

Dated, New York, February 5th, 1908.

E. HENRY LACOMBE,  
*United States Circuit Judge.*

## "EXHIBIT C."

In the Circuit Court of the United States for the Southern District of New York.

THE BARBER ASPHALT PAVING COMPANY, COMPLAINANT,

*against*

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST.

Nicholas Avenue Railway Company, defendant.

In equity.

And now, on this fifth day of February, 1908, this cause came on further to be heard upon the pleadings and upon the order  
36 made in this cause on the first day of February, 1908, directing that the parties show cause why the receivership of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company and of its property should not be continued during the pendency of this suit, and thereupon, after hearing Abram J. Rose, of counsel for complainant, Latham G. Reed, of counsel for defendant, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, and George W. Davison, of counsel for defendant, Central Trust Company of New York;

It is ordered, adjudged, and decreed, that the defendant, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, is insolvent, and that its assets and property of every description constitute a fund in which the complainant and other creditors of the said defendant corporation are interested, and that the assets of said corporation should be marshalled and the extent of the rights, liens, equities, and priorities of the several creditors should be ascertained and decreed by the court; and

It is further ordered, adjudged, and decreed, that Frederick W. Whitridge, Esq., heretofore, by said order of February 1st, 1908, appointed temporary receiver of said defendant, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, be continued as receiver during the pendency of this suit of said defendant, and of all the property of the said defendant, real, personal, and mixed, of whatsoever kind and description, and wheresoever situated, including all railroads owned, leased, or operated by said defendant, all tracks, terminal facilities, offices, shops, and all buildings and appurtenances of every kind, all cars and other rolling  
37 stock, and equipment, tools, machinery, furniture, fixtures, materials, and supplies, books of account, records, and other books, papers, and accounts, cash in bank, on deposit, and in hand, money, debts, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income, accruing and to accrue, as well as all interests, easements, privileges, and franchises, and all assets of every kind. That the said receiver be, and he hereby is, authorized to run, manage, and operate said railroads and properties, to collect

the rents, income, tolls, and profits of the said railroad property, and to exercise the authority and franchises of said defendant, and discharge its public duties, acting in all things subject to the supervision of this court; and

It is further ordered, adjudged, and decreed, that the said receiver be, and he hereby is, authorized, in his discretion, to employ and discharge and fix the compensation of all attorneys, managers, superintendents, agents, and employees, and to make such payments and disbursements as may be needful and proper in so doing.

That the said receiver be, and he hereby is, authorized to institute and prosecute in his own name or in the name of the Forty-second Street, Manhattanville, and St. Nicholas Avenue Railway Company all such suits as may be necessary in his judgment for the proper protection of the trust estate and the discharge of his trust, and likewise to defend all actions instituted against him as receiver, and also to appear in and continue or defend any suits now pending in any court to which said defendant, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, is a party, the continuance or defence of which will, in the judgment of said receiver,

be necessary for the proper protection of the trust estate or the  
38 interests and rights of creditors connected therewith; and

It is further ordered, adjudged, and decreed, that said receiver be, and he is hereby, authorized, in his discretion, from time to time, out of the funds coming into his hands, to pay the expenses of operating the said property and executing his trusts, and to make such repairs to such properties and premises as in his judgment may be necessary in order safely to conduct operations under this order; also, with the approval of this court, to pay all taxes and assessments upon the said properties or any part thereof, and all such rentals and installments as may fall due or become due for the use of any portion of said railroad and other property, and also to pay and discharge the current and unpaid pay rolls incurred in the operation of said railroad at any time within four months prior to his appointment; and also to pay and discharge the supply and construction accounts incurred in the operation of said railroad, and all such other claims arising from the previous operation of said property as in his judgment, on examination, are proper to be paid as expenses of operation, providing that no payment of such accounts or claims shall be made without the express order of this court.

The said receiver is hereby required to open proper books of account, wherein shall be stated the earnings, expenses, receipts, and disbursements of his said trust, and preserve proper vouchers for all payments made by him on account thereof; and

It is further ordered that each and every of the officers, directors, agents, and employees of the defendant, said The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, and all  
other persons whomsoever be, and they are hereby, required

39 and commanded forthwith, upon demand of said receiver or his duly authorized agent, to turn over and deliver to said

receiver or his duly constituted representative any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, or other property in his or their hands or under his or their control.

And the defendant, the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, and its officers, directors, agents, and employees, and all other persons claiming to act by, through, or under the defendant, and all other persons whomsoever, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties or his operating the same, and any party in interest may apply for further direction; and

It is further ordered, that the bond of the said receiver in the sum of fifty thousand dollars heretofore given by said receiver for the faithful performance of his duties, and filed in this cause, stand and be, and the same hereby is, approved.

Dated, New York, February 5th, 1908.

E. HENRY LACOMBE,  
*U. S. Circuit Judge.*

40 "EXHIBIT D."

In the Circuit Court of the United States, for the Southern District of New York.

THE LORAIN STEEL COMPANY, COMPLAINANT,	} In equity.
<i>against</i>	
UNION RAILWAY COMPANY OF NEW YORK CITY, DEFENDANT.	

And now, on this sixth day of April, 1908, this cause came on further to be heard upon the pleadings and upon the order made in this cause on the 31st day of March, 1908, directing that the parties hereto show cause why the receivership of the Union Railway Company of New York City and of its property should not be continued during the pendency of this suit, and thereupon after hearing Charles MacVeagh, of counsel for complainant, Latham G. Reed, of counsel for defendant, Union Railway Company of New York City, and John M. Bowers, of counsel for defendant, Central Trust Company of New York, it is

Ordered, adjudged, and decreed that the defendant, Union Railway Company of New York City, is insolvent and that its assets and property of every description constitute a fund in which the complainant and other creditors of the said defendant are interested; and that the assets of said corporation should be marshalled and the extent of the rights, liens, and priorities of the several creditors should be ascertained and decreed by the court; and it further

41 Ordered, adjudged and decreed, that Frederick W. Whitridge, heretofore by said order of March 31st, 1908, appointed temporary receiver of said defendant, Union Railway Company of

New York City, and of the property of said defendant, be continued as receiver, during the pendency of this suit, of said defendant and of all the property of said defendant, real, personal, and mixed, of whatsoever kind and description, and wheresoever situated, including all railroads owned, leased, or operated by said defendant, all tracks, terminal facilities, offices, shops, and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, materials and supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income, accruing and to accrue, as well as all interests, easements, privileges and franchises, and all assets of every kind. That the said receiver be, and he hereby is, authorized to run, manage, and operate said railroads and properties, to collect the rents, incomes, tolls, and profits of the said railroad property, and to exercise the authority and franchises of said defendant, and discharge its public duties, acting in all things subject to the supervision of this court: and it is further

Ordered, adjudged and decreed, that the said receiver be, and he hereby is, authorized in his discretion to employ and discharge and fix the compensation of all attorneys, managers, superintendents, agents, and employees, and to make such payments and disbursements as may be needful and proper in so doing.

42 That the said receiver be, and he hereby is, authorized to institute and prosecute in his own name, or in the name of the Union Railway Company of New York City, all such suits as may be necessary in his judgment for the proper protection of the trust estate and the discharge of his trust and likewise to defend all actions instituted against him as receiver, and also to appear in and continue to defend any suits now pending in any court to which said defendant, Union Railway Company of New York City, is a party, the continuance or defence of which will in the judgment of said receiver be necessary for the proper protection of the trust estate or the interests and rights of creditors connected therewith: and it is further

Ordered, adjudged and decreed, that said receiver be, and he is hereby, authorized in his discretion from time to time out of the funds coming into his hands to pay the expenses of operating the said property and executing his trusts, and to make such repairs to such properties and premises as in his judgment may be necessary in order safely to conduct operations under this order: also with the approval of this court to pay all taxes and assessments upon the said properties or any part thereof, and all such rentals and installments as may fall due or become due for the use of any portion of said railroad and other property, and also to pay and discharge the current and unpaid pay rolls incurred in the operation of said railroad at any time within four months prior to his appointment: and also to pay and discharge the supply and construction accounts incurred in the operation of said railroad and of all such other claims arising from the previous op-



eration of said property as in his judgment on examination are proper to be paid as expenses of operation, providing that no payment  
 43 of such accounts or claims shall be made without the express order of this court.

The said receiver is hereby required to open proper books of account wherein shall be stated the earnings, expenses, receipts, and disbursements of the said trust and preserve proper vouchers for all payments made by him on account thereof.

And it is further ordered that each and every of the officers, directors, agents, and employees of the defendant and all other persons whomsoever be, and they are hereby, required and commanded forthwith upon demand of said receiver or his duly authorized agent to turn over and deliver to said receiver or his duly constituted representative any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, or other property in his or their hands or under his or their control.

And the defendant, Union Railway Company of New York City, and its officers, directors, agents, and employees and all other persons claiming to act by, through, or under the defendant, and all other persons whomsoever are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties or his operating the same, and any party in interest may apply for further directions.

And it is further ordered that the bond of the said receiver in the sum of fifty thousand dollars heretofore given by said receiver for the faithful performance of his duties, and filed in this cause, stand, and be, and the said bond hereby is, approved.

Dated, New York, April 6, 1908.

E. HENRY LACOMBE,  
*U. S. Circuit Judge.*

44

"EXHIBIT E."

# United States Internal Revenue.

## *Return of annual net income.*

(Section 38, act of Congress approved August 5, 1909.)

## Transportation corporations.

Return of net income received during the year ending December 31, 1909, by the Third Avenue Railroad Company, a corporation, the principal place of business of which is located at the city of New York, in the State of New York.

1. Total amount of paid-up stock outstanding at close of year..... \$15,995,800.00
2. Total amount of bonded or other indebtedness outstanding at close of year..... \$48,034,769.18
3. Gross income (see Note A)..... None.

## Deductions.

4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B) -----
  5. (a) Total amount of losses sustained January 1 to December 31 -----
  - (b) Total amount of depreciation January 1 to December 31 -----
  - 45     Total (see Note B) -----
  6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B) -----
  7. (a) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof -----
  - (b) Foreign taxes paid -----
  - Total (see Note B) -----
  8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax -----
  - Total deductions ----- None.
  9. Net income ----- None.
  - Specific deductions from net income allowed by law ----- \$5,000.00
- 
10. Amount on which tax at one per centum is to be calculated for assessment ----- None.

By an order of the United States Circuit Court for the Southern District Court, dated January 6th, 1908, Frederick W. Whitridge was appointed the receiver of all the railroads, properties, and premises, real, personal, and mixed, of the Third Avenue Railroad Company:

That he immediately took possession of all such property and now continues in the possession thereof:

That the Third Avenue Railroad Company has not had  
46     possession of its property since said date and has not received any income from the operation and management thereof from said January 6th, 1908.

STATE OF NEW YORK,

*County of New York, to wit:*

Charles Remsen, president, and John M. Perry, treasurer, of the Third Avenue Railroad Company corporation, whose return of annual net income is set forth above, being severally duly sworn, each for himself deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and

from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth is the full amount of gross income, without any deduction whatsoever, received from all sources by the said corporation during the year stated, and that the net income therein set forth is the full amount on which tax is proper to be assessed.

CHARLES REMSEN,  
*President.*

JOHN M. PERRY,  
*Treasurer.*

Sworn and subscribed to before me this 16th day of February, 1910.

[SEAL.]

E. MARIE KELLOGG,  
*Notary Public, Kings County.*

Certificate filed in New York County.

NOTE A.—Gross income shall consist of the gross revenue derived from the operation and management of the business and property of the corporation making the return, together with all amounts of income (including dividends received on stock  
47 of other corporations, joint stock companies, and associations subject to this tax) derived from all sources as shown by the entries on its books from January 1 to December 31, of the year for which return is made.

NOTE B.—The deductions authorized shall include all expense items under the various heads acknowledged as liabilities by the corporation making the return and entered as such on its books from January 1 to December 31 of the year for which return is made.

NOTE C.—This form, properly filled out and executed, must be in the hands of the collector of internal revenue for the district in which is located the principal office of the corporation making the return, on or before March 1.

### " EXHIBIT F."

United States internal revenue.

*Return of annual net income.*

(Section 38, act of Congress approved August 5, 1909.)

Transportation corporations.

Return of net income received during the year ending December 31, 1909, by The Dry Dock, E. B'way and Battery Railroad Company, a corporation, the principal place of business of which is located at New York City, in the State of New York.

1. Total amount of paid-up stock outstanding at close  
of year----- \$1,200,000.00

- 48 2. Total amount of bonded or other indebtedness outstanding at close of year----- \$4,009,202.70
3. Gross income (see Note A)----- None.

## Deductions.

4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)-----
5. (a) Total amount of losses sustained January 1 to December 31-----
- (b) Total amount of depreciation January 1 to December 31-----
- Total (see Note B)-----
6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)-----
7. (a) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof-----
- (b) Foreign taxes paid-----
- Total (see Note B)-----
8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax-----
- 49 Total deductions----- None.
9. Net income----- None.
- Specific deductions from net income allowed by law----- \$5,000.00
10. Amount on which tax at one per centum is to be calculated for assessment----- Nothing.

By order of the United States Circuit Court for the Southern District Court, dated February 1, 1908, Frederick W. Whitridge was appointed the receiver of all the railroads, properties and premises real, personal and mixed of the Dry Dock, E. B'way & Battery Railroad Company:

That he immediately took possession of all such property and now continues in the possession thereof:

That the Dry Dock, E. B'way & Battery Railroad Company has not had possession of its property since said date and has not received any income from the operation and management thereof from said February 1, 1908.

STATE OF NEW YORK,

*City and County of New York, to wit:*

Arthur Coppell, president, and George W. Davison, treasurer, of the Dry Dock, East Broadway and Battery Railroad Company corporation, whose return of annual net income is set forth above, being severally duly sworn, each for himself, deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth is the full amount of gross income, without any deduction whatsoever, received from all sources by the said corporation during the year stated, and that the  
50 net income therein set forth is the full amount on which tax is proper to be assessed.

ARTHUR COPPELL,

*President.*

GEORGE W. DAVISON,

*Treasurer.*

Sworn and subscribed to before me by Arthur Coppell, this 19th day of February, 1910.

[SEAL.]

ALBERT L. WICKERT, #C. C.

*Notary Public No. , New York County.*

Subscribed and sworn to by George Davison before me this 19th February, 1910.

[SEAL.]

GEORGE MAURER.

*Notary Public, Kings County.*

Certificate filed in New York County.

NOTE A.—Gross income shall consist of the gross revenue derived from the operation and management of the business and property of the corporation making the return, together with all amounts of income (including dividends received on stock of other corporations, joint-stock companies, and associations subject to this tax) derived from all sources as shown by the entries on its books from January 1 to December 31, of the year for which return is made.

NOTE B.—The deductions authorized shall include all expense items under the various heads acknowledged as liabilities by the corporation making the return and entered as such on its books from January 1 to December 31 of the year for which return is made.

51 NOTE C.—This form, properly filled out and executed must be in the hands of the collector of internal revenue for the district in which is located the principal office of the corporation making the return, on or before March 1.

## "EXHIBIT G."

United States internal revenue.

*Return of annual net income.*

(Section 38, act of Congress approved August 5, 1909.)

Transportation corporations.

Return of net income received during the year ending December 31, 1909, by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, a corporation, the principal place of business of which is located at New York City, in the State of New York.

- |   |                |
|---|----------------|
| 1. Total amount of paid-up stock outstanding at close of year-----                | \$2,500,000.00 |
| 2. Total amount of bonded or other indebtedness outstanding at close of year----- | 10,385,400.74  |
| 3. Gross income (see Note A)-----   | None.          |

## Deductions.

- |   |            |
|---|------------|
| 4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)-----         |            |
| 52 5. (a) Total amount of losses sustained January 1 to December 31-----  |            |
| (b) Total amount of depreciation January 1 to December 31-----  |            |
| Total (see Note B)-----   |            |
| 6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)----- |            |
| 7. (a) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof-----                                |            |
| (b) Foreign taxes paid-----   |            |
| Total (see Note B)-----   |            |
| 8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax-----      |            |
| Total deductions-----   | None.      |
| 9. Net income-----  | None.      |
| Specific deductions from net income allowed by law-----   | \$5,000.00 |

10. Amount on which tax at one per centum is to be calculated for assessment----- Nothing.

By an order of the United States Circuit Court for the Southern District Court, dated February 1st, 1908, Frederick W. Whitridge was appointed the receiver of all the railroads, properties and premises, real, personal and mixed of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company;

That he immediately took possession of all such property and now continues in the possession thereof;

That the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company has not had possession of its property since that date and has not received any income from the operation and management thereof from said February 1st, 1908.

STATE OF NEW YORK,

*City and County of New York, to wit:*

Franklin L. Babcock, president, and George W. Davison, treasurer, of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company corporation, whose return of annual net income is set forth above, being severally duly sworn, each for himself, deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth is the full amount of gross income, without any deduction whatsoever, received from all sources by the said corporation during the year stated, and that the net income therein set forth is the full amount on which tax is proper to be assessed.

FRANKLIN L. BABCOCK,

*President.*

GEORGE W. DAVISON,

*Treasurer.*

Sworn and subscribed to before me this 19th day of February, 1910.

[SEAL.]

GEORGE MAURER,

*Notary Public, Kings County.*

Certificate filed in New York County.

NOTE A.—Gross income shall consist of the gross revenue derived from the operation and management of the business and property of the corporation making the return, together with all amounts of income (including dividends received on stock of other corporations, joint stock companies, and associations subject to this tax) derived from all sources as shown by the entries on its books from January 1 to December 31 of the year for which return is made.



NOTE B.—The deductions authorized shall include all expense items under the various heads acknowledged as liabilities by the corporation making the return and entered as such on its books from January 1 to December 31 of the year for which return is made.

NOTE C.—This form, properly filled out and executed, must be in the hands of the collector of internal revenue for the district in which is located the principal office of the corporation making the return or before March 1.

### “EXHIBIT II.”

United States internal revenue.

*Return of annual net income.*

(Section 38, act of Congress approved August 5, 1909.)

Transportation corporations.

Return of net income received during the year ending December 31, 1909, by the Union Railway Company, a corporation, the principal place of business of which is located at the city of New York, in the State of New York.

- |   |                   |
|---|-------------------|
| 1. Total amount of paid-up stock outstanding at close of year-----                      | \$2, 000, 000. 00 |
| 55    2. Total amount of bonded or other indebtedness outstanding at close of year----- | \$6, 854, 077. 42 |
| 3. Gross income (see Note A)-----   | None.             |

### Deductions.

- |   |  |
|---|--|
| 4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)-----         |  |
| 5. (a) Total amount of losses sustained January 1 to December 31-----   |  |
| (b) Total amount of depreciation January 1 to December 31-----  |  |
| Total (see Note B)-----   |  |
| 6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)----- |  |
| 7. (a) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof-----                                |  |
| (b) Foreign taxes paid-----   |  |
| Total (see Note B)-----   |  |

8. Amount received by way of dividends upon stock of other corporations, joint stock companies, associations, and insurance companies subject to this tax-----
- 56      Total deductions----- None.
9. Net income----- None.
- Specific deductions from net income allowed by law----- \$5,000.00
10. Amount on which tax at one per centum is to be calculated for assessment----- Nothing.

By an order of the United States Circuit Court for the Southern District Court, dated March 31st, 1908, Frederick W. Whitridge was appointed the receiver of all the railroads, properties, and premises, real, personal, and mixed, of the Union Railway Company of New York City.

That he immediately took possession of all such property and now continues in the possession thereof;

That the Union Railway Company has not had possession of its property since said date and has not received any income from the operation and management thereof from said March 31, 1908.

STATE OF NEW YORK.

*County of New York, to wit:*

Edward A. Maher, president, and Reune Martin, treasurer, of the Union Railway Company corporation, whose return of annual net income is set forth above, being severally duly sworn, each for himself, deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth is the full amount of gross income without any deduction whatsoever, received from all sources by the said corporation during the year stated, and that the net income therein set forth is the full amount on which tax is proper to be assessed.

EDWARD A. MAHER.

*President.*

REUNE MARTIN.

*Treasurer.*

Sworn and subscribed to before me this 17th day of February, 1910.

[SEAL.]

JAMES F. FEELY.

*Notary Public, New York County.*

NOTE A.—Gross income shall consist of the gross revenue derived from the operation and management of the business and property of the corporation making the return, together with all amounts of income (including dividends received on stock of other corporations,

joint-stock companies, and associations subject to this tax) derived from all sources as shown by the entries on its books from January 1 to December 31 of the year for which return is made.

NOTE B.—The deductions authorized shall include all expense items under the various heads acknowledged as liabilities by the corporation making the return and entered as such on its books from January 1 to December 31 of the year for which return is made.

NOTE C.—This form, properly filled out and executed, must be in the hands of the collector of internal revenue for the district in which is located the principal office of the corporation making the return, on or before March 1.

58

*Answer.*

Circuit Court of the United States, for the Southern District of New York.

In equity.

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,

*v.*

THE THIRD AVENUE RAILROAD COMPANY, NEW YORK City Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company, Metropolitan Street Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company, the Pennsylvania Steel Company, the Degnon Contracting Company, and Morton Trust Company, as trustee under the refunding mortgage dated March 21, 1902, made by the Metropolitan Street Railway Company, defendants.

AMERICAN HAY COMPANY, COMPLAINANT,

*v.*

DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD Company, defendant.

59 THE BARBER ASPHALT PAVING COMPANY, COMPLAINANT,

*v.*

THE FORTY-SECOND STREET, MANHATTANVILLE, AND ST. Nicholas Avenue Railway Company, defendant.

THE LORAIN STEEL COMPANY, COMPLAINANT,

*v.*

UNION RAILWAY COMPANY OF NEW YORK CITY, DEFENDANT.

In the matter of the application of the United States of America for an order directing Frederick W. Whitridge, appointed receiver in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910, for the Third Avenue Railroad Company, Dry Dock, East Broadway, and Battery Railroad Company, Union Railway Company of New York City, and the Forty-second Street, Manhattanville, and St. Nicholas Avenue Railway Company, of their and each of their net income to the collector of internal revenue for the district in which each of the said corporations had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909. (36 Stat. L., 112.)

Frederick W. Whitridge, as receiver of the property of the Third Avenue Railroad Company mortgaged by its first consolidated mortgage or deed of trust, dated May 15, 1900, and as receiver of the Dry Dock, East Broadway, and Battery Railroad Company, and as receiver of the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, and as receiver of the property of said the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company mortgaged by its second or income mortgage, dated July 1st, 1885, and as receiver of the Union Railway Company of New York City, by Evarts, Choate & Sherman, his solicitors, hereby answers the petition in the above-entitled causes of the United States of America, verified September 18, 1911, as follows:

First. He admits on information and belief the allegations contained in paragraph first of said petition.

Second. He admits on information and belief the allegations contained in paragraph second of said petition, except that he denies, on information and belief, the allegation contained in said paragraph second—that all of the corporations mentioned in said paragraph were in the years of 1909 and 1910 engaged in business in the city, county, and State of New York.

Third. He denies the allegations contained in paragraph third of said complaint, and alleges that on the 6th day of January, 1908, he was duly appointed receiver of certain property of said The Third Avenue Railroad Company, mortgaged by its first consolidated mortgage or deed of trust, dated May 15, 1900, by an order of the United States Circuit Court for the Southern District of New York, dated and entered on that day in the first above-entitled suit, a copy of which is annexed to said petition, marked Exhibit "A," and he begs leave to refer to said mortgage or deed of trust, or to a copy thereof, upon the hearing herein.

Fourth. He admits the allegations contained in paragraphs fourth, fifth, sixth, and seventh of said petition.

Fifth. He admits the allegations contained in paragraph eighth of said petition.

Sixth. He denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph ninth of said petition.

Seventh. Upon information and belief, he denies each and every allegation contained in paragraph tenth of said petition.

Eighth. Answering the allegations contained in paragraph eleventh of said complaint, he admits that he has made no returns for  
62 or on behalf of any of said corporations, and he denies on information and belief that he, as receiver of any of said corporations, was required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L. 112), to make any such returns for the years 1909 and 1910, or for either of these years, or for any other year.

Ninth. He denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs twelfth, thirteenth, fourteenth, fifteenth, and sixteenth of said petition.

Tenth. And further answering said petition, he alleges that on or about May 17th, 1909, a decree was duly entered in the first above entitled cause adjudging that the amount due and owing on that day by said The Third Avenue Railroad Company on its bonds issued and outstanding under its said first consolidated mortgage amounted to the sum of \$40,381,173.33, and directing that unless said company pay the same and the other sums within the time in that behalf specified in said decree the property and income mentioned and described in said decree be sold in the manner therein specified, and said company foreclosed from any and all estate, right, title, or interest in said property; that on March 1st, 1910, said property was duly sold, pursuant to said decree, to James N. Wallace, Adrian Iselin, and Harry Bronner for the sum of \$26,000,000; that said sale was duly confirmed by decree dated April 13th, 1910, which decree also directed that said property be conveyed to said purchasers, subject to the conditions and reservations therein contained; that by deed dated and delivered April 18th, 1910, said property was duly conveyed subject to the conditions and reservations contained in  
63 said decree, and that said purchasers have ever since then and now are the owners of said property, subject to such conditions and reservations and the right of the court to retain possession thereof through its said receiver until the performance of the conditions in that behalf specified in said decree and deed; and he begs leave to refer to said decrees dated May 17th, 1909, and April 13th, 1910, and said deed upon the hearing herein.

Eleventh. And further answering said petition, he alleges that by order made and entered June 11th, 1909, in a certain cause then and now pending in said court, wherein the Union Trust Company

of New York is complainant and said The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company and others are defendants, brought to foreclose the second or income mortgage of said company, dated July 1, 1885, he was duly appointed receiver of the property covered by said mortgage, with the powers and duties in said order specified, and that he has ever since been and acted as such receiver; that by decree entered in said cause on November 30, 1909, it was adjudged that the amount due and owing by said company on that date on its bonds issued and outstanding under said mortgage was \$1,670,933, and directing that unless said company pay the same within the time specified in said decree the property and income mentioned and described in said decree be sold and said company foreclosed from all estate, right, title, and interest therein; that said company has not paid said sum or any part thereof; that said sale has not been had, but has been adjourned from time to time.

Twelfth. And he alleges upon information and belief that during the years 1909 and 1910 none of the said corporations of which he is receiver as aforesaid carried on or did any business in respect of the property in his possession as such receiver, respectively, and received none of the income thereof, but that all of such property was in his exclusive possession as receiver as aforesaid, and that he as such receiver managed, controlled, and operated the same and carried on and did all the business in respect thereof and received all the income arising therefrom; and that the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112), are not applicable to him as receiver of any of the said corporations, and that he as receiver of said corporations, respectively, is not required to make or file any return as such receiver or on behalf of the said corporations, or any of them, and that neither the property nor the income received by him as receiver of said corporations is liable for or subject to the tax imposed by said section.

Wherefore this respondent prays that the said petition be dismissed.

F. W. WHITRIDGE,

*Receiver of the property of the Third Avenue Railroad Company, mortgaged by its first consolidated mortgage; and receiver of the Dry Dock, East Broadway & Battery Railroad Company; and receiver of the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, and of the property of said company mortgaged by its second or income mortgage; and receiver of the Union Railway Company of New York City.*

EVARTS, CHOATE & SHERMAN,

*Solicitors for Frederick W. Whitridge, as receiver aforesaid.*

## 65 STATE OF NEW YORK, COUNTY OF NEW YORK,

*Southern District of New York:*

Frederick W. Whitridge, being duly sworn, deposes and says that he is the receiver of the property of the Third Avenue Railroad Company, mortgaged by its first consolidated mortgage or deed of trust dated May 15, 1900, and receiver of the Dry Dock, East Broadway & Battery Railroad Company, and receiver of the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company and of the property of the said Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, mortgaged by its second or income mortgage dated July 1st, 1885, and receiver of the Union Railway Company of New York City; that he has read the foregoing answer subscribed by him and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the sources of deponent's information and the grounds of his belief as to all matters not stated in said answer of his own knowledge are papers and information which has come to him in the course of his administration as receiver as aforesaid.

F. W. WHITRIDGE.

Sworn to before me this 26th day of October, 1911.

CHARLES ENGEL,

*Notary Public, Queens County.*

Certificate filed in N. Y. Co.

## 66

## RECEIVER'S EXHIBIT 1.

*First consolidation mortgage, dated May 15, 1900.*

District Court of the United States for the Southern District of  
New York,

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,	}
<i>against</i>	
THE THIRD AVENUE RAILROAD COMPANY ET AL., DEFEND-	
ants, and three other suits,	

In the matter of the application of the United States of America for an order directing Frederick W. Whitridge, appointed receiver in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910 for the Third Avenue Railroad Company dry dock, East Broadway and Battery Railroad Company, Union Railway Company of New York City, and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, of their and each of their net income to the collector of



internal revenue for the district in which each of the said corporations had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112).

67 First consolidated mortgage, dated May 15, 1900.

The Third Avenue Railroad Company to Morton Trust Company, as trustee.

It is hereby stipulated and agreed for the purposes of the appeal taken herein from the order of February 7th, 1912 (in order to avoid the necessity of printing said mortgage in full in the record therein, this stipulation to be printed in lieu thereof), that, in and by the terms of the first consolidated mortgage of the Third Avenue Railroad Company, dated May 15th, 1900, to Morton Trust Company, as trustee, referred to in paragraph third of the answer herein of Frederick W. Whitridge, as receiver, the Third Avenue Railroad Company "granted, bargained, sold, assigned, transferred, and conveyed" \* \* \* unto the said Morton Trust Company, its successors and assigns, forever, all and singular, the corporate property, rights, powers, privileges, and franchises of the railroad company, including all the railroads, premises, and property of the railroad company situated, lying, and being in the borough of Manhattan, in the said city of New York or elsewhere, including" (here follows in the mortgage a full description of the said property), and that the said mortgage was given to secure an issue of bonds to an amount not exceeding in the aggregate \$50,000,000, \$37,560,000 of which bonds were due and outstanding at the time of the making, on May 17, 1909, of the decree of foreclosure and sale in the suit brought to foreclose said mortgage by the Central Trust Company of New York (which had been substituted for the Morton Trust Company, 68 as trustee under said mortgage) against the Third Avenue Railroad Company and others.

And it is also stipulated that this stipulation shall be considered as annexed to the answer herein, and shall be printed as a part of the record on said appeal instead of printing the said mortgage at length, but the right to refer upon the argument of said appeal to the whole of the original or a copy of said mortgage and to hand up copies thereof to the judges sitting for the determination of such appeal, or use the same, should they desire to do so, at the time of the argument thereof, is hereby reserved to either party.

Dated New York, May 2nd, 1912.

HENRY A. WISE,

*United States Attorney for the Southern District of New York.*

EVARTS, CHOATE & SHEERMAN,

*Solicitors for Frederick W. Whitridge, as Receiver.*

*Decree, dated May 17th, 1909.*

Circuit Court of the United States, for the Southern District of New York.

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,  
*against*

THE THIRD AVENUE RAILROAD COMPANY; NEW YORK City Railway Company; Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company; Metropolitan Street Railway Company; Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company; the Pennsylvania Steel Company; the Degnon Contracting Company; and Morton Trust Company, as trustee under the refunding mortgage dated March 21, 1902, made by the Metropolitan Street Railway Company; and William W. Ladd, as receiver of New York City Railway Company, defendants.

In equity.

70 This cause came on to be heard on the eleventh day of March, A. D. 1909, upon the original bill of complaint filed herein on January 3, 1908, and the amended and supplemental bill of complaint filed herein by leave of court on April 21, 1908, and upon the exhibits attached to and made parts of said bill of complaint and amended and supplemental bill of complaint and upon the separate answers of the defendants, Morton Trust Company, as trustee under the refunding mortgage dated March 21, 1902, made by the Metropolitan Street Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company and also as receivers of New York City Railway Company, Metropolitan Street Railway Company, New York City Railway Company, and the Third Avenue Railroad Company, respectively, thereto, and upon the order for a decree pro confesso against the defendants The Pennsylvania Steel Company and The Degnon Contracting Company entered on proof of their several defaults in pleading by answer or demurrer, bearing date March 19th, 1909, and duly filed on the 24th day of March, 1909, and upon the order herein bearing date the 12th day of March, 1909, and duly filed the same day made on consent of the defendant, William W. Ladd, as receiver of the New York City Railway Company, and his solicitors, by which order said Ladd, as such receiver, is joined as a party defendant in this suit and bound by all proceedings had herein to the date of said order with like force and effect as if he had been originally joined as a defendant in this cause, and upon the testimony and evidence taken in this cause before one of the standing examiners of this court, and upon all the exhibits and other proofs offered in evidence in this

cause, and all the several orders, papers and proceedings in this cause, and upon a petition of said defendants, Adrian H. Joline and  
71 Douglas Robinson, as receivers of New York City Railway Company and of Metropolitan Street Railway Company, verified December 13, 1907, and filed in this court the same day in a suit therein pending by the Pennsylvania Steel Company and the Degnon Contracting Company, complainants, against New York City Railway Company and others, defendants, and upon a petition of the defendant The Third Avenue Railroad Company, verified December 30, 1907, and filed January 3, 1908, and the opinions delivered and orders of this court made in said suit in regard thereto; and was argued by John M. Bowers, Esq., of counsel for the complainant, and by John M. Perry, Esq., of counsel for the defendant The Third Avenue Railroad Company, on March 11, 1909, and thereupon upon consideration thereof, it is

Ordered, adjudged and decreed as follows:

That the bill of complaint and amended and supplemental bill of complaint herein be and the same are hereby taken pro confesso against the defendants, The Pennsylvania Steel Company and The Degnon Contracting Company, and each of them, an order for such a decree pro confesso against said two defendants, having been made in this cause on March 19, 1909; and that all and singular the material allegations contained in said bill of complaint and amended and supplemental bill of complaint are true, as against said defendants.

And it is further ordered, adjudged and decreed as follows:

First. That the mortgage made by the defendant The Third Avenue Railroad Company, to Morton Trust Company, as  
72 trustee, bearing date May 15, 1900, and recorded in the register's office of the County of New York, on May 18, 1900, in liber 9, general mortgages, page 235, is a valid and subsisting mortgage constituting a lien upon the property, franchises and rights of the defendant The Third Avenue Railroad Company, as said property franchises and rights are described more particularly in paragraph fourth of this decree.

That Central Trust Company of New York, the complainant in this suit, was on December 27, 1907, duly substituted and appointed trustee under said mortgage in the place and stead of said Morton Trust Company, in accordance with and pursuant to the terms and provisions of said mortgage and at the request and with the consent of the defendant The Third Avenue Railroad Company, and the holders of a majority of the bonds issued and outstanding under and secured by said mortgage. That said Central Trust Company of New York duly accepted its appointment as such trustee and has, since the 27th day of December, 1907, been the duly qualified and acting trustee under said mortgage, with all the powers and authority and subject to all the duties and obligations of the original trustee thereunder. That all the trust property, rights and estate held by Morton Trust Company, as trustee under said mortgage were granted, conveyed and

transferred to said Central Trust Company of New York as trustee thereunder, by deed of conveyance dated December 27, 1907.

That bonds to the amount of thirty-seven million five hundred and sixty thousand dollars (\$37,560,000) have been duly certified and issued under said mortgage and are secured thereby and are now outstanding and unpaid. That default has been made in the payment of the interest upon said bonds falling due on the first day of January, 1908, and also in the payment of the subsequent interest on said bonds falling due on the first day of July, 1908, and on the first day of January, 1909.

That payment of the interest which became due on said bonds on the 1st day of January, 1908, was demanded of the defendant The Third Avenue Railroad Company, by the Central Trust Company of New York, the trustee under said mortgage, and said interest was not paid to said trustee or to the holders of said bonds and is now in arrears and unpaid. That said interest continued in arrears and unpaid for more than ninety days after the 1st day of January, 1908, and was unpaid on April 2nd, 1908. That thereupon and by reason thereof, the trustee under said mortgage, at the election in writing of a majority in interest of the holders of said bonds and pursuant to article fifth of said mortgage, declared in writing that the principal of all of said bonds issued and outstanding be forthwith due and payable, and on the 2nd day of April, 1908, served written notice thereof on the defendant The Third Avenue Railroad Company, and demanded the payment of the principal and accrued interest on said bonds and the principal of said bonds thereupon became due and payable and is now due and payable. That the defendant The Third Avenue Railroad Company, has not paid the principal of said bonds nor any part thereof.

That default has been made in the payment of the instalment of rent which became due and payable on October 13, 1907, by the terms and provisions of a certain lease made by the defendant

74 The Third Avenue Railroad Company, to the defendant, Metropolitan Street Railway Company, dated April 13, 1900, and of the subsequent instalments of such rent which became due and payable January 13th, 1908, and April 13, 1908, which lease covers the premises and property covered by and subject to the lien of said mortgage, and is subject and subordinate thereto.

That said defendant, Metropolitan Street Railway Company, by written guarantee endorsed upon each of said bonds issued and outstanding under said mortgage guaranteed the payment of the principal and interest of said bonds according to the tenor thereof, and also by written instrument duly executed May 19th, 1900, covenanted and agreed with the trustee under said mortgage and with each and every present and future holder of the bonds issued and to be issued under said mortgage, in case of default in the payment of the interest or principal, or both, of any of said bonds, to pay such principal and interest, and did thereby guarantee the prompt payment of said principal and interest, which guarantee was declared to be uncon-

ditional and not dependent upon any act or default on the part of the defendant The Third Avenue Railroad Company.

That the amount due for principal and interest of said bonds issued and outstanding under and secured by said mortgage is at the date of this decree the sum of forty million three hundred and eighty-one thousand one hundred seventy-three 33/100 dollars, being the sum of thirty-seven million five hundred and sixty thousand dollars (\$37,560,000) principal, and interest thereon at four (4) per centum per annum from July 1, 1907, to the date of this decree.

75 Second. That under an order made and filed herein on May 20th, 1908, receiver's certificates to the amount of two million five hundred thousand dollars (\$2,500,000) of principal, dated the 21st day of December, 1908, and payable one year from date, bearing interest at the rate of six per cent (6%) per annum, payable semi-annually on the first days of January and July, have been duly issued and are now outstanding and unpaid, and that said receiver's certificates are secured by a lien for the amount of the principal and interest thereof upon all the property of the Third Avenue Railroad Company, prior and paramount to the lien of the first consolidated mortgage of said The Third Avenue Railroad Company dated May 15th, 1900, commonly known as the first consolidated mortgage and mentioned and referred to in paragraph first of this decree, and any bonds issued thereunder, and prior and paramount to the lien of any and all other mortgages or deeds of trust, claims, or liens on said property whatsoever, excepting only the lien of a certain first mortgage of five million dollars (\$5,000,000) made and executed by said The Third Avenue Railroad Company to the Farmers' Loan and Trust Company, as trustee, dated July 1st, 1887, and recorded in the office of the register of the county of New York on November 11th, 1887, in Liber 2220 of Mortgages, page 380. That upon the sale of the property hereinafter described under the terms of this decree, by order of this court, said certificates, both principal and all interest due thereon, shall be paid from the first moneys realized from the sale under this decree of the property hereinafter described.

76 Third. That the defendant The Third Avenue Railroad Company, is hereby required within twenty days after the service of notice of entry of this decree, and of a copy of this decree upon its solicitors in this suit, to pay to the clerk of this court, subject to the further order of the court herein, the above amount found due for principal and interest upon the bonds issued and outstanding under said first consolidated mortgage, to wit, the sum of forty million three hundred and eighty-one thousand, one hundred and seventy-three 33/100 dollars, with interest thereon at the rate of six per cent (6%) per annum from the date of this decree to the date of said payment, together with the said clerk's fees for receiving and disbursing said sum of money.

Upon payment of said sum and upon giving an undertaking, without sureties, to pay such sums as said defendant may hereafter be directed to pay by decree in this cause on account of debts and ob-

ligations of the receivership and compensation of the receiver and his counsel, and on account of allowances to the parties in this cause and their solicitors and counsel, and such other sums as are hereby or may hereafter in this cause be adjudged to be entitled to priority of payment over the aforesaid mortgage to complainant, all interest upon the above mentioned bonds and coupons shall cease, and this defendant The Third Avenue Railroad Company, shall be relieved from the operation of the decree of sale herein contained.

Any undertaking which may be given by the Third Avenue Railroad Company for the purpose above set forth shall be secured by lien upon all the property of the said defendant then in the

77 custody of this court, which is hereinafter directed to be sold, and a lien to that extent is hereby charged upon said property, and the defendant The Third Avenue Railroad Company, shall from time to time execute, acknowledge and record such instrument or instruments as the court shall from time to time direct to give effect to said lien. The defendant The Third Avenue Railroad Company, or any person entitled to exercise a right of redemption on its behalf, may apply to this court at any time within said period of twenty days for an order requiring the complainant or the receiver, or any other person holding any fund which in equity should be applied in whole or in part to the purpose of such redemption, to pay the same or such part thereof as may be equitable to the clerk of this court.

Fourth. That unless the defendant The Third Avenue Railroad Company, shall be relieved as aforesaid from the operation of the decree of sale herein contained, the special master hereinafter appointed is hereby authorized and directed to sell at public auction to the highest bidder, in conformity with the directions in that behalf in this decree more particularly set forth, all and singular the property, estate, rights, franchises, contracts, and privileges, and choses in action, of said defendant The Third Avenue Railroad Company, which, at the time of such sale are subject to the lien of the aforesaid mortgage held by the complainant, including all the property hereinafter specifically described and directed to be sold, together with all the horses, cars, carriages, tools, chattels, machinery, motors, engines, and equipment of every description then used or acquired

for use upon or in connection with the several lines or routes of

78 street railway hereinafter described and directed to be sold.

The property so directed to be sold shall include particularly the following parcels:

All and singular, the corporate property, rights, powers, privileges, and franchises of the Third Avenue Railroad Company, including all the railroads, premises, and property of the Third Avenue Railroad Company situated, lying, or being in the Borough of Manhattan, in said city of New York, or elsewhere, including the following-described property, to wit:

(Here follows a description of the line of railway of the Third Avenue Railroad Company and of certain parcels of land with the buildings thereon, situated in the Borough of Manhattan, city and



State of New York, together with all improvements thereon, and all buildings, franchises, rights of way, trackage rights, contracts, consents, leaseholds, easements, and other rights or interests owned by the Third Avenue Railroad Company, and all tracks, machinery, rolling stock, equipment, cars, horses, tools, implements, furniture, and other supplies, and all maps, drawings, records, deeds, contracts and agreements, patents, etc., and also "all and every other railroad, lease, estate, right, interest, privilege, immunity, franchise (corporate or otherwise), property, and thing, real, personal, or mixed, claim and demand," which the Third Avenue Railroad Company owned; and also all tolls, rents, issues, income, profits, and other benefits and advantages growing out of all or any of the said railroads, franchises, or property, together with the appurtenances, and also certain bonds, stocks, mortgages, notes, and other securities, in the possession of the Central Trust Company of New York, as trustee under the mortgage, which are specifically enumerated; and

79 also "all and singular the rights, powers, privileges, and franchises of the Third Avenue Railroad Company to construct, maintain, and operate a double-track extension, with the necessary wires and equipment, for the purpose of conveying passengers in the Borough of Manhattan, city of New York," upon a certain route therein described, and more particularly described in a certain contract between the city of New York and the Third Avenue Railroad Company, dated March 4th, 1909; and also "all and singular each and every other right, power, privilege, and franchise to construct, maintain, or operate any street railroad in the city of New York or extension thereof, which may be granted to the Third Avenue Railroad Company, or to Frederick W. Whitridge, its receiver, at any time subsequent to the date of this decree and prior to the sale herein, and hereby directed and ordered, and the vesting of title to the property so sold in the purchaser or purchases thereof.")

The special master hereinafter appointed is directed to make a list showing with as great particularity as he may deem practicable all the railways, rights, and franchises aforesaid, with the additions thereto and the extensions thereof and the trackage rights and operating agreements above referred to, showing their location in the several streets and other places of the city of New York, the length of the line on each street or portion of a street traversed by said railways, routes, or trackage rights, and the character of the track, whether single track or double track, and whether adapted to electric or horse operation; and said list shall be filed with the special master for public inspection prior to the sale. The said list is advisory only and shall not be construed to be a warranty of title, and the

80 purchaser or purchasers at the sale shall be entitled only to such title or interest as the special master has power to transfer by virtue of this decree.

Together with the tools, chattels, machinery, motors, engines, and equipment of every description located in and upon the said lands



and buildings or elsewhere at the date of this decree, or generally kept or used in connection therewith for the generation, conversion, transformation, or transmission of electrical power and light or for any other purpose connected with the maintenance or operation of the above-described railways or any of them, and which at the time of the sale shall continue to be in the possession of or under the control of the receiver of the Third Avenue Railroad Company, including all cables and their appurtenances for the transmission of alternating current from said property to other power houses or substations, and also all cables and their appurtenances for the transmission of direct current from the substation located on part of said property to the several points of delivery of such direct current, and all cables and their appurtenances for the transmission of alternating current into said substation, together with all and singular the tenements, hereditaments, and appurtenances belonging to or in anywise appertaining to the said land.

That the property of said defendant The Third Avenue Railroad Company, with the exception of said above-mentioned stocks and bonds, the equity of redemption of which is claimed by the defendant, New York City Railway Company, and the defendant, William W. Ladd, as its receiver, is so situated that the same can not be sold in parcels without great prejudice to all the parties in interest, and that it is expedient and for the best interest of all said parties concerned that the same be sold as an entirety, as hereinbefore provided. That all said property, excepting therefrom said stocks and bonds, more particularly described as follows:

(Here follows a description of the said stocks and bonds.)

be first offered for sale and sold in one parcel, and in the event that the proceeds of the sale of said property are not sufficient to pay the amounts hereinafter mentioned in article seventh of this decree, then and in that event that said stocks and bonds, the equity of which is claimed by the defendants, New York City Railway Company and William W. Ladd, as its receiver, be sold in one parcel. That if it be necessary, in order to realize the amounts due and payable, as provided in article seventh of this decree, to sell said stocks and bonds above mentioned, and should said special master sell the same as hereinbefore in this article directed, he shall immediately thereafter put up and offer for sale and invite bids upon all and singular the mortgaged property and premises described in this article, including said stocks and bonds in one parcel and as an entirety, and shall sell the same to the highest bidder therefor. That if the highest amount bidden for all said property when offered for sale as an entirety and in one parcel shall exceed the total of the two several amounts bidden for the two several parcels or portions of said mortgaged property and premises, when sold in two separate parcels in the manner and as hereinbefore directed and provided, then said sale of the mortgaged property and premises in one parcel in an entirety shall supersede said two sales in separate parcels as hereinbefore provided and said sales of said separate parcels shall be

82     deemed of no effect and the bidders thereunder shall acquire no rights or interests in the property struck down to them as purchasers thereof, but said sales shall be reported to the court by said special master pursuant to the provisions of article twelfth of this decree.

Fifth. That an inventory shall be prepared by the special master as of June 1st, 1909, which inventory shall be filed with the clerk of the court not later than August 1st, 1909. This inventory shall enumerate the rolling stock of the road in the possession of the receiver, stating the type and character of each item and giving its numbers. This inventory shall also state the number and location of the various dynamos, transformers, and converters and the number of horses. The inventory shall include such other articles of personal property in the possession of the receiver as in his opinion are of a value in excess of one hundred dollars each, and such additional articles as the special master shall think it wise to include. Such inventory and valuation shall be advisory only, and shall not, with respect to value or title or any other matter, be construed as a warranty, but all purchases shall be deemed to be made in reliance upon the purchaser's own knowledge or information as to the property purchased.

The property, both real and personal, hereby directed to be sold, may be inspected by intending bidders at the sale hereunder, subject to such reasonable regulations as the receiver may prescribe.

Sixth. That any purchaser of the said property, or any part thereof, at the sale hereby decreed, may satisfy and make  
83     good the balance of his bid, above the sum required to be paid in cash, in whole or in part, by delivering to the special master appointed to conduct such sale, bonds duly certified under the mortgage mentioned in paragraph first of this decree, or coupons thereto appertaining, or receiver's certificates mentioned in paragraph second of this decree, which securities, unless in negotiable form and payable to bearer, shall be duly endorsed or assigned in blank. Such bonds, coupons, or receiver's certificates, whether delivered to the said special master at the time of sale or subsequently, shall be received at such price or value as shall be equivalent to the sum which would be payable out of the net proceeds of such sale, if made for money, to the holder or holders of said bonds, coupons or receiver's certificates for his or their just share or proportion in that character of such net proceeds, upon a due accounting and apportionment and distribution of such net proceeds. If there shall be realized on the sale and applied on the purchase price the entire amount due upon said bonds, coupons, or receiver's certificates, then and in that case, the said bonds, coupons, and receiver's certificates, or such of them as are so paid in full, shall be cancelled and retained by the special master; provided that when all said bonds and coupons issued under and secured by said mortgage and remaining unpaid shall be cancelled and held by the special master, he may deliver them to the

trustee of the mortgage securing the same, upon receiving a satisfaction thereof.

But if said entire amounts are not realized on the sale and applied upon the purchase price, the special master shall stamp or write upon each bond, coupon, or certificate the amount which is so applied, and also the amount of the deficiency remaining after such  
84 application, and shall return such bonds, coupons, and certificates to the purchaser or purchasers, from whom the same were received.

Seventh. That the fund arising from the sale of the properties above directed to be sold be applied as follows:

(1) To the payment of the costs of this cause and of all proper expenses attendant upon said sale or sales, including the compensation of the special master appointed to make the sale, and the payment of all charges, allowances, and disbursements of the complainant and its solicitors and counsel, and of the receiver and his solicitors and counsel, and also all such other proper allowance, compensation, and disbursements to the parties and their counsel, as the court shall order.

(2) To the payment of such sums, if any, as may hereafter be found due by the receiver of the Third Avenue Railroad Company to the receiver of the New York City Railway Company and to the receivers of Metropolitan Street Railway Company, whether such indebtedness of the receiver of the Third Avenue Railroad Company shall arise by reason of the transfer of the properties of the Third Avenue Railroad Company by the receivers of New York City Railway Company to the receiver of the Third Avenue Railroad Company or by reason of dealings between the receivers or receiver of the New York City Railway Company or the receivers of Metropolitan Street Railway Company and the receiver of the Third Avenue Railroad Company, or by reason of such order of this court as may be made in proceedings arising upon the petition of  
85 the receiver of the Third Avenue Railroad Company against the receiver of the New York City Railway Company for use and occupation, or otherwise, and to the payment of such sums, if any, as may hereafter be adjudged to be payable by the receivers or receiver of the New York City Railway Company arising out of the management, custody, maintenance, or operation by them of the property of the Third Avenue Railroad Company, in so far as such sums shall not be paid by the receiver of the Third Avenue Railroad Company or by the receiver of the New York City Railway Company, including sums so adjudged to be payable on account of torts committed in the course of such management, custody, maintenance, and operation.

(3) To the payment of said receiver's certificates heretofore issued under the order of this court to the amount of two million five hundred thousand dollars (\$2,500,000) principal, together with the interest accrued thereon to the date of payment.

(4) To the payment of such portions as the court may find to be equitable of the amounts, if any, which may be adjudged to be entitled to priority of payment out of the proceeds of said sale over the principal and interest of the bonds secured by the mortgage to the complainant.

(5) To the payment of the principal and interest of the bonds and coupons mentioned in paragraph first of this decree; in case of a deficiency of said proceeds to pay in full the amount of principal and interest due and unpaid upon said bonds or coupons, said proceeds shall be applied ratably in proportion to the amounts due and unpaid on said bonds and coupons, respectively, without preference of one bond or the interest due thereon over any of the others.

86 In case of a deficiency of said proceeds to pay in full the amount of principal and interest due and unpaid upon said bonds or coupons, the defendants, The Third Avenue Railroad Company and Metropolitan Street Railway Company, are hereby adjudged and decreed jointly and severally liable for the amount of such deficiency, the defendant The Third Avenue Railroad Company, as the party liable for the payment of the principal and interest due and unpaid upon said bonds and coupons, and the defendant, Metropolitan Street Railway Company, as guarantor of the payment of the principal and interest of the bonds issued and outstanding under said mortgage, and the complainant is hereby directed and permitted to enter and docket judgment against said defendants The Third Avenue Railroad Company and Metropolitan Street Railway Company, for the amount of such deficiency.

(6) Should there be any surplus the special master is hereby directed to hold the same subject to the further order of the court in this cause.

The court reserves power to direct that any of the amounts in this article hereinbefore set forth shall be paid from property or choses in action which the receiver of the Third Avenue Railroad Company or the complainant, as trustee under the said mortgage, may have in their possession, or to which they, or either of them, may be in any way entitled.

Bids for the whole property must provide for a payment in cash of such sum as the court may deem sufficient to meet the first four classes above enumerated of charges upon the proceeds of the sale.

87 Eighth. That the property hereby directed to be sold shall be sold subject to all valid taxes, valid assessments, or valid liens prior to the lien of the aforesaid mortgage to the complainant, existing in favor of any person or persons, corporation or corporations not a party to this cause, except such as are herein specifically directed to be paid out of the proceeds of sale. Said sale shall be made expressly subject to the lien of a certain first mortgage of five million dollars (\$5,000,000) made by the defendant The Third Avenue Railroad Company, to the Farmers' Loan and Trust Com-

pany of the city of New York, trustee, dated July 1st, 1887, and recorded in the office of the register of the county of New York on November 11th, 1887, in Liber 2220 of Mortgages, page 380, and to the amount due for principal and interest upon the bonds issued thereunder and secured thereby at the date of said sale.

Ninth. That in the event of the insufficiency of the proceeds of sale to pay in full the amounts herein directed to be paid out of such proceeds prior to the payment of the principal and interest secured by the mortgage to the complainant, the court reserves the right from time to time to require payment of the deficiency by the purchaser under this decree. In the event of the refusal or omission of any purchaser to pay the amount so required to be paid within thirty days after service upon him of a certified copy of the order requiring such payment, the court reserves the right to retake and resell the property sold under this decree to such purchaser, and to apply the net proceeds of such resale to the payment of the deficiency with which such purchaser is chargeable, rendering unto such purchaser the surplus, if any. But no such purchaser shall be personally liable for the amount of such deficiency, or any part thereof, and the remedy hereby provided for enforcing payment of such deficiency against the purchaser, shall be exclusive of all other remedies.

Tenth. That it shall be a condition of sale of the lines of railway, leasehold estates, and parcels of land separately enumerated and directed to be sold by article fourth of this decree that the purchaser shall, as a part of the consideration for such sale and in addition to the price bid, assume all pending contracts in respect to the property of the Third Avenue Railroad Company, whether leasehold or otherwise, theretofore made by the receiver of the Third Avenue Railroad Company, and that the said purchaser or purchasers, its, his, or their successors and assigns, shall perform all such contracts, and shall pay, satisfy, and discharge any unpaid indebtedness and obligations or liabilities, whether in contract or in tort, which shall have been duly contracted or incurred by the receiver of the Third Avenue Railroad Company in respect to the property of the defendant The Third Avenue Railroad Company, or which shall have been duly contracted or incurred by the receivers of the New York City Railway Company in the course of their management, custody, maintenance, or operation of the property of the Third Avenue Railroad Company before the delivery of possession of the property sold, and which shall not have been paid by the said receiver or receivers, or which shall not be paid out of the proceeds of sale as hereinbefore provided, and shall indemnify and save harmless the said receiver from any liability resulting therefrom. In the event that said purchaser or purchasers shall refuse after demands made to perform any such contract or discharge any such indebtedness, obligation, or liability, the person or persons holding the claim therefor may upon fifteen

days' notice to said purchaser or purchasers, their successor or successors, assign or assigns, file his or their petition in this court to have such claim enforced against the property aforesaid in accordance with the usual practice of this court; and such purchaser or purchasers, and his or their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt, or demand so sought to be enforced, and either party shall have the right to appeal from any judgment, decree, or order made thereon.

Jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree; and the court reserves the right to retake and resell said property in case the purchaser or purchasers, his or their successors or assigns, shall fail to comply with any order of the court in respect to the performance of such contract or the payment of such indebtedness, obligation, or liability, within thirty days after service of a certified copy of such order. No purchaser shall be held personally liable under this article of the decree for any unpaid indebtedness of the receiver or for any work done or materials furnished under any unfinished contract, except such as shall have been done or furnished after the delivery of possession of the property sold to such purchaser and with his consent. Subject to that exception, the method herein provided for enforcing the liability of the purchaser or purchasers for the unpaid indebtedness and other obligations of the receiver or for his unfinished contracts shall be exclusive of all other remedies.

90 Said receiver shall, prior to the sale hereunder and as soon as practicable, file with the clerk of this court and with the special master a statement in such detail as he shall find practicable, showing the principal items of indebtedness, obligations, and liabilities contracted or incurred by him remaining unpaid, and a list of the chief contracts to be assumed by the purchaser hereunder, and shall, within two weeks prior to the time of sale, file with the clerk of this court and the special master a further statement showing as definitely as he shall find practicable any additional indebtedness, obligations, or liabilities contracted and incurred and outstanding, and also the amount of the indebtedness, obligations, and liabilities included in such first statement which may have been discharged; but such statement shall be advisory only and shall in nowise constitute a warranty, nor shall such statement constitute ground for a release from any bid because of any representation therein or omission therefrom.

Eleventh. That all the property directed by this decree to be sold shall be sold by Howard Taylor, esq., who is hereby appointed special master for that purpose, on the 2nd day of September, 1909, at an hour to be fixed by him, at the north main entrance of the county courthouse of the county of New York, in the city of New York, with power to adjourn said sale at any stage of the proceedings to any room in said courthouse which he may be permitted to use by the authorities having the custody thereof, and with power to adjourn said sale from time to time to a future day by oral announcement at the time appointed for the sale, upon consent of the solicitors



91 for the complainant, or with the approval of the court, without prejudice to the notice of sale and without the necessity of publishing any further notice; but the special master may, notwithstanding, give such notice of any such adjournment by publication or otherwise as he shall think fit.

The special master shall give notice of such sale by publication once a week, for four consecutive weeks, in one newspaper of general circulation printed and published in the city and county of New York, which notice shall contain a brief general description of the property to be sold, a statement of the time and place of the sale, and a reference to this decree for a more particular description of such property, and a statement of the terms and conditions of sale. The special master shall give such further notice of such sale by publication or otherwise as he shall think fit. Any party to this cause, or any holder of any of the bonds, coupons, or receiver's certificates herein mentioned may purchase at such sale, and may hold the property purchased in his, its, or their own right, free from any trust or right of redemption.

Twelfth. That the special master shall first offer for sale and invite bids upon all the property first directed to be sold by article fourth of this decree (being all the mortgaged premises with the exception of said stocks and bonds) in one parcel, including the interest therein of all parties to this cause, except such interest and right of resale as is expressly reserved by articles ninth and tenth of this decree, and shall provisionally accept the bid of the highest qualified bidder therefor.

92 In the event that the amount so bidden for said property so first offered for sale is not sufficient to pay the amounts mentioned and directed to be paid by article seventh of this decree that the special master shall next offer for sale and invite bids upon all the stocks and bonds particularly enumerated and described in and directed to be sold in a separate parcel by article fourth of this decree, which stocks and bonds shall be offered for sale and sold in one parcel and as an entirety, including the interest therein of all parties to this cause, except such interest and right of resale as is expressly reserved in and by articles ninth and tenth of this decree, and shall provisionally accept the bid of the highest qualified bidder on said property.

That should it be necessary to sell, and should said special master sell, said stocks and bonds pursuant to and for the purposes mentioned in this decree he shall immediately thereafter and next offer for sale and invite bids upon all the mortgaged property and premises described in article fourth of this decree, including said stocks and bonds, in one parcel and as an entirety, including the interest therein of all parties to this cause, except such interest and right of resale as is expressly reserved by articles ninth and tenth of this decree, and shall provisionally accept the bid of the highest qualified bidder on said entire property. The special master shall thereupon report each of said bids so provisionally accepted to the court.



Thirteenth. That unless the court shall otherwise direct, for just causes shown, upon the petition of any person desiring to bid at such sale, no bids shall be received from any bidder for the property hereby first directed to be sold (being all the mortgaged  
93 premises with the exception of said stocks and bonds), nor for the whole mortgaged premises (including said stocks and bonds), when offered for sale in one parcel as an entirety as herein directed to be sold, who shall not first deposit with the special master the sum of two hundred thousand dollars (\$200,000) either in cash or in a check certified by a National or State bank or trust company, situate in the city of New York, or in lieu thereof, receiver's certificates mentioned in paragraph second of this decree in the principal amount of two hundred thousand dollars (\$200,000), or bonds or coupons mentioned in paragraph first of this decree, to the amount in face value of not less than two hundred and fifty thousand dollars (\$250,000), to qualify such bidder to bid upon the property hereby first directed to be sold (being all the mortgaged premises with the exception of said stocks and bonds) or upon said whole mortgaged premises (including said stocks and bonds) when offered for sale in one parcel as an entirety as herein directed to be sold. In the case of persons desiring to bid upon the sale of said stocks and bonds when offered for sale separately in one parcel as herein directed, the deposit of cash or certified check as above provided in the sum of one hundred thousand dollars (\$100,000), or of said receiver's certificates in a like amount, or of said bonds and coupons to an amount in face value of not less than one hundred and fifty thousand dollars (\$150,000), shall be deemed a sufficient qualification for such bidder.

The cash, check, or securities deposited by any bidder in order to qualify him to bid at the sale shall be held as a pledge that such bidder will make good his bid, if accepted by the court. The  
94 cash, checks, and securities so deposited, except those deposited by any bidder whose bid shall be provisionally accepted, shall be returned by the special master at the completion of the sale, to the bidder or bidders from whom they were received. The cash, checks, or securities so deposited by any bidder or bidders whose bid shall be provisionally accepted as provided in this decree, shall be returned by the special master to the bidder or bidders from whom they were received, if such provisional acceptance shall thereafter not be confirmed by the court.

The cash, check, or securities deposited by any bidder in order to qualify him to bid at the sale shall be forfeited and applied to the expenses of said sale and of the receivership of the property of the Third Avenue Railroad Company in the event that the said bidder shall not make good his bid.

In the event that any successful bidder shall fail to make good his bid as the court shall direct upon confirmation to him of such sale, the court may order a resale of the property covered by such bid

and the said bidder shall be liable for all the expenses thereof and for any deficiency of price realized thereon.

No minimum price is put by this decree upon the property to be sold or any part thereof, the court reserving full power and discretion to reject any bid for the said entire property which, in the judgment of the court, is inadequate or subject to just objection.

Fourteenth. That in addition to the cash deposited upon any bid at the time of said sale as hereinbefore required, which shall be received as a part of the purchase price, there shall also be paid  
95 in cash by the purchaser upon the confirmation of such sale, and from time to time thereafter, such further portions of and on account of the purchase price of said property, as the court may direct.

All sums of money received upon any such sale shall be deposited by the special master in the Central Trust Company of New York.

The court reserves the right to reject any bid and to retake and resell the property purchased upon the failure of any purchaser to comply with the terms of sale or with any order of the court requiring payment within thirty days after service upon such purchaser of a certified copy of such order.

Fifteenth. That the enumeration in this decree or in the inventory hereby directed to be prepared of any lease, or traffic, or trackage, or operating agreement, or other executory contract, to which the Third Avenue Railroad Company, or any of its constituent companies, is a party, or by which it may in any manner be bound, shall not be deemed to constitute an adoption of such lease, agreement, or contract by the court or by the receiver, and the court reserves the right, notwithstanding this decree, or any sale hereunder, from time to time to direct the receiver whether or not to adopt any such lease, agreement, or contract. At any time after confirmation of the sale and before delivery of possession to the purchaser of the property affected by any such lease, agreement, or contract, the court will direct the receiver to take such action in respect to the adoption or nonadoption of any such lease, agreement, or contract as may be requested by the accepted  
bidder for the same or the property affected thereby, upon re-  
96 ceiving such indemnity as the court shall deem necessary for the protection of the receiver.

Any purchaser or purchasers of the entire property directed to be sold by this decree, or of any part thereof, shall be allowed one year from the date of confirmation within which to elect to adopt and continue in force, or to refuse to adopt, any lease, traffic, or trackage, or operating agreement, or other executory contract, which may be included in the property sold or may constitute an incident or appurtenance thereof.

Such election shall be made by an instrument in writing subscribed by such purchaser or purchasers, and filed in the office of the clerk of this court, and no conduct or user of rights by any purchaser or

purchasers, within such period of one year, unaccompanied by the filing of such written instrument, shall be deemed to conclude the purchaser or purchasers in respect of such election. In the event of the failure by such purchaser or purchasers to file a statement of election to refuse to adopt any such contract within the period of one year above allowed, he or they shall be deemed to have elected to adopt such contract, and to accept the same as part of the property purchased.

In the event that such purchaser or purchasers shall elect not to adopt any such lease, traffic, or trackage, or operating agreement, or other executory contract, he shall reassign and retransfer all his right, title, and interest in the same to the Third Avenue Railroad Company or its receiver or assigns, without deduction, however, from the sum paid or payable by him on account of his purchase thereof. Pending such election by such purchaser or purchasers the Third Avenue Railroad Company, or its receiver or assigns, shall  
97 have the right to make any payments which may be necessary to be made in order to preserve the rights acquired under such lease, traffic, or trackage, or operating agreement, or other executory contract, and any such payment so made by the Third Avenue Railroad Company, or its receiver or assigns, shall be repaid to the Third Avenue Railroad Company, its receiver or assigns, by the said purchaser or purchasers, and such repayment shall be enforceable against said purchaser in the manner specified in paragraph tenth hereof. The court reserves power to direct the payment by the purchaser or by the receiver of such amounts as shall be found to be equitable upon an accounting or otherwise in respect to any lease, traffic or trackage, or operating agreement which the purchaser hereunder shall elect not to adopt, or which he shall require the receiver to elect not to adopt, and jurisdiction over the property hereby directed to be sold is reserved to enforce such payment.

Sixteenth. That the court reserves the exclusive power and jurisdiction to deliver to the purchaser or purchasers title to and possession of the property hereby directed to be sold and to determine any and all controversies as to the character, extent, and validity of the possession of such purchaser or purchasers acquired through the execution of this decree.

The special master shall put the purchaser in possession and the purchaser shall take possession of the property sold under this decree within sixty days after the date of entry of the decree confirming said sale; but the court reserves the right upon good cause shown, to postpone the date of such delivery of possession.

98 Seventeenth. That upon confirmation of the sale hereinbefore ordered and upon compliance with the terms of sale by the purchaser or purchasers of the property of the Third Avenue Railroad Company above directed to be sold, the special master is hereby authorized and required to make, execute, and deliver to such pur-

chaser or purchasers, or his or their assigns, a proper instrument or instruments of conveyance, assignment, and transfer of the properties so sold, in which instrument or instruments the receiver of the Third Avenue Railroad Company, if requested by the purchaser, shall join. Upon the request of the purchaser or purchasers and upon the execution of such instrument of conveyance, assignment, and transfer, the Third Avenue Railroad Company and each and every person holding the record title to any part of the property herein described or directed to be sold for the account of the Third Avenue Railroad Company, and said receiver and the Central Trust Company, as trustee under said mortgage, shall execute and deliver to such purchaser or purchasers all such instruments of transfer, assignment, or further assurance as shall be necessary to establish and perfect the title of such purchaser or purchasers to the property so sold.

The purchaser or purchasers receiving such instrument or instruments of conveyance, assignment, or transfer from the special master shall be invested with and shall hold possession of and enjoy the said property, and all the rights and franchises appertaining thereto, subject to the provisions of this decree, as fully and completely as the Third Avenue Railroad Company or its receiver now hold or enjoy and has heretofore held and enjoyed the same. And further, 99 that the said purchaser or purchasers shall have and be entitled to hold the said properties so sold, freed and discharged of and from the lien of the mortgage mentioned in paragraph first of this decree and of and from any lien arising out of any order of the court or action of the receiver herein, except as otherwise herein specifically provided, and from any and all estate, right, title, interest, lien, or claim of said the Third Avenue Railroad Company, its stockholders, creditors, and receiver, and of any and all parties to this cause, and any and all persons claiming by, through, or under them, or any of them.

Eighteenth. That the court reserves for further determination all matters of equity not herein expressly adjudged, and any party to this cause or other claimant contemplated in this decree may apply for further order and direction touching the matters in issue undisposed of by this decree. The February, 1909, equity term of this court is extended until after the complete execution of the provisions of this decree and until after final disposition of all matters herein reserved for future determination or action by this court.

Dated New York, May 17, 1909.

JAMES L. MARTIN,  
*United States District Judge.*

100

## RECEIVER'S EXHIBIT 3.

*Decree dated April 13th, 1910.*

United States Circuit Court for the Southern District of New York.

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,  
*against*

THE THIRD AVENUE RAILROAD COMPANY; NEW YORK City Railway Company; Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company; Metropolitan Street Railway Company; Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company; the Pennsylvania Steel Company; the Degnon Contracting Company; and Morton Trust Company, trustee under mortgage dated March 21st, 1902, made by the Metropolitan Street Railway Company; and William W. Ladd, as receiver of New York City Railway Company, defendants.

This cause came on again this day to be heard upon the  
101 report of sale of Howard Taylor, Esq., the special master appointed by the decree of foreclosure and sale made and entered herein May 17, 1909, to sell the property thereby directed to be sold, which report bears date March 1, 1910, and was filed herein in the office of the clerk of this court on the 2nd day of March, 1910; and upon motion of Central Trust Company of New York, complainant, asking that said report of sale be approved and confirmed, and that the court accept and confirm a certain bid mentioned in said report, and upon the petition dated March 7, 1910, of James N. Wallace, Adrian Iselin, and Harry Bronner, they being the highest and best bidders for all the mortgaged property by the said decree of foreclosure and sale directed to be sold, as shown by said special master's report of sale; and upon the order made on the aforesaid petition on the 9th day of March, 1910, making the said James N. Wallace, Adrian Iselin, and Harry Bronner parties to this suit and directing that unless, on or before the 18th day of March, 1910, at the hour of 2.15 o'clock p. m., before Hon. E. Henry Lacombe, one of the judges of this court, in the post-office building, in the city of New York, the parties to this cause, or some of them, show cause to the contrary, the said report of sale be confirmed, and requiring the defendants and each of them to show cause at the time and place above specified why this court should not make an order or decree in this cause confirming said sale, directing the time and manner of payment of the purchase price, fixing the form of the deed and other instruments to be delivered to the purchasers, and

adjudging and directing all and every such matter and thing as the court might deem advisable to direct to be done for the purpose of carrying out the said decree of foreclosure and sale; and upon proof of due service of said notice of motion and order to show cause upon the solicitors for all the defendants herein, which said petition and order to show cause and proof of due service thereof, together with proof of service of said master's report, with notice of filing on the 2nd day of March, 1910, on the several solicitors for all the said defendants have been filed in this cause, and upon all the other proceedings in this cause;

And it appearing by the terms of sale signed by said Howard Taylor as such special master, and filed in this cause, that the said special master, at the time of the sale, did announce that the \$1,000,000 of receiver's certificates issued and outstanding under the order of this court made herein on December 27, 1909, and mentioned in the notice of sale published by the said special master, would be payable out of the proceeds of the sale in like manner as the \$2,500,000 of receiver's certificates mentioned in the said decree of foreclosure and sale;

And it appearing also that all the directions in the said decree of foreclosure and sale as to the filing of inventories, publication of notice of the sale and other matters, and as to the sale of the property therein directed to be sold, were fully and in all respects complied with; that the said property described in said decree and thereby directed to be sold was duly offered for sale on March 1, 1910, in the manner directed in said decree; that said James N. Wallace, Adrian Iselin, and Harry Bronner duly qualified as bidders at said sale by depositing with said special master at the time and place of said sale, as required by the provisions of said decree, two hundred and fifty first consolidated four per cent hundred year gold bonds of the Third Avenue Railroad Company duly certified and outstanding under the mortgage mentioned in paragraph first of said decree of foreclosure and sale, of the aggregate face value of \$250,000, with coupons thereto attached for all unpaid interest thereon; and that the said James N. Wallace, Adrian Iselin, and Harry Bronner did bid the sum of \$26,000,000 for all the said property as an entirety, which was the highest and best bid for said property, and was provisionally accepted by said special master as provided in said decree of foreclosure and sale;

And the complainant and purchasers having appeared on the return of said order to show cause, and pursuant to said notice of motion, before Hon. E. Henry Lacombe, one of the judges of this court, on the 18th day of March, A. D. 1910, by John M. Bowers, Esq., of counsel for the complainant, and Messrs. Guthrie, Bangs & Van Sinderen, of counsel for said purchasers, and the defendants, Adrian H. Joline and Douglass Robinson as receivers of the Metropolitan Street Railway Company, having also appeared by William M. Chadbourne, Esq., their counsel, and Frederick W. Whitridge, as receiver of the Third Avenue Railroad Company, having also ap-

peared by Herbert J. Bickford, Esq., his counsel, and American Surety Company of New York, a claimant against the defendant the Third Avenue Railroad Company, having also appeared by Messrs. Guggenheimer, Untermyer & Marshall, its counsel, and no other defendants or claimants herein having appeared on the return of said order to show cause or pursuant to said notice; and no exception to the said report of the special master having been filed and the time to file exceptions thereto having expired;

104 And no cause being shown why the report of said special master and said sale should not be confirmed, or why the prayer of said petition dated March 7, 1910, of the said James N. Wallace, Adrian Iselin, and Harry Bronner should not be granted;

And the said purchasers, James N. Wallace, Adrian Iselin, and Harry Bronner, on April 4, 1910, having filed their supplemental petition in this cause, dated March 31st, 1910, setting forth that they are the holders of \$36,737,000, face value of the bonds of said the Third Avenue Railroad Company duly certified and outstanding under the mortgage mentioned in paragraph first of said decree of foreclosure and sale, with the unpaid coupons for interest on such of said bonds as are coupon bonds, in addition to said bonds of the face value of \$250,000 deposited by said purchasers with said special master at said sale, and said purchasers having in their said petition offered to deliver said bonds of the face value of \$36,737,000 and the unpaid coupons appertaining thereto to the said special master, and also forthwith to pay to said special master the sum of \$600,000 in cash on account of said purchase price; and said purchasers having prayed in their said supplemental petition that the said special master be authorized and directed to accept the said bonds of the face value of \$36,737,000 and the unpaid coupons appertaining thereto and the said sum of \$600,000 in cash, and to apply the same, together with the said bonds of the face value of \$250,000 and the unpaid coupons thereon, on account of said purchase price of \$26,000,000, and that a proper deed or deeds and instruments of assignment be executed

105 and delivered granting, assigning, and conveying to the said James N. Wallace, Adrian Iselin, and Harry Bronner as joint tenants, and not as tenants in common, their grantees and assigns, all the property sold to them as aforesaid; subject to the payment thereafter by them, their grantees or assigns, as and when ordered by the court, of the residue of such purchase price; and subject to all the conditions, terms, and reservations in that behalf of said decree of foreclosure and sale,

Now, therefore, upon motion of Bowers & Sands, solicitors for Central Trust Company of New York, the complainant, and of Guthrie, Bangs & Van Sinderen, solicitors for said purchasers, James N. Wallace, Adrian Iselin, and Harry Bronner, it is

Ordered, adjudged, and decreed as follows, to wit:

First. That said report of sale of Howard Taylor, special master, bearing date March 1, 1910, and filed herein on March 2, 1910, be



spread at large upon the record of this cause, and be, and the same hereby is, in all things approved and confirmed.

Second. That the said bid of James N. Wallace, Adrian Iselin, and Harry Bronner of the sum of \$26,000,000, being the highest and best bid for all the mortgaged property by said decree of foreclosure and sale directed to be sold, when the same was sold as an entirety and in one parcel, be, and the same is hereby, accepted and made absolute; and that the other conditional bids mentioned in said special master's report of sale, being for parts and parcels of said mortgaged property when offered for sale separately, pursuant to the terms and provisions of said decree, be, and the same hereby are, rejected and adjudged to be of no effect.

106 Third. That said sale made by said special master to the said James N. Wallace, Adrian Iselin, and Harry Bronner of all said mortgaged property mentioned and described in the notice of sale and in said decree, and thereby directed to be sold as an entirety and in one parcel, constituting all of the property directed by said decree to be sold, be, and the same is hereby, ratified, approved, confirmed, and made absolute; subject, however, to all the terms, provisions, conditions, and reservations of said decree of foreclosure and sale and of this decree of confirmation.

Fourth. That the said purchasers from time to time, as and when directed by order of this court, shall pay in full, in the manner provided in said decree of foreclosure and sale and in this decree of confirmation the said sum of \$26,000,000 by them bid; and shall also pay all sums, if any, in addition to the amount so bid, and assume all pending contracts, subject to the right to reject the same, and comply with all conditions and be entitled to all benefits and be bound by all reservations to the extent and in the manner provided in and by said decree of foreclosure and sale or this decree of confirmation.

Fifth. That said sum of \$26,000,000, payable by the purchasers as the purchase price of said property, be applied as follows, namely:

(1) To the payment of the costs of this cause and of all proper expenses attendant upon said sale, including the compensation of the special master appointed to make the sale, and of all charges, allowances, and disbursements of the complainant and its solicitors and counsel, and of the receiver and his solicitors and counsel, and  
107 also all such other proper allowances, compensation, and disbursements to the parties and their counsel as the court shall order.

(2) To the payment of such sums, if any, as may hereafter be found due by the receiver of the Third Avenue Railroad Company to the receiver of the New York City Railway Company and to the receivers of the Metropolitan Street Railway Company, whether such indebtedness of the receiver of the Third Avenue Railroad Company shall arise by reason of the transfer of the properties of the Third Avenue Railroad Company by the receivers of New York City Railway Company to the receiver of the Third Avenue Railroad Com-

pany, or by reason of dealings between the receivers or receiver of the New York City Railway Company or the receivers of Metropolitan Street Railway Company and the receiver of the Third Avenue Railroad Company, or by reason of such order of this court as may be made in proceedings arising upon the petition of the receiver of the Third Avenue Railroad Company against the receiver of the New York City Railway Company for use and occupation, or otherwise, and to the payment of such sums, if any, as may hereafter be adjudged to be payable by the receivers or receiver of New York City Railway Company arising out of the management, custody, maintenance, or operation by them of the property of the Third Avenue Railroad Company, in so far as such sums shall not be paid by the receiver of the Third Avenue Railroad Company, or by  
108 the receiver of New York City Railway Company, including sums so adjudged to be payable on account of torts committed in the course of such management, custody, maintenance, and operation.

(3) To the payment of the certificates of said receiver in this cause, amounting to \$3,500,000, issued under orders of this court, and accrued interest thereon.

(4) To the payment of such portions as the court may find to be equitable of the amounts, if any, which may be adjudged to be entitled to priority of payment out of said proceeds of said sale over the principal and interest of the bonds secured by the mortgage mentioned in paragraph first of said decree of foreclosure and sale, including a certain claim of the American Surety Company of New York for \$44,561.32 and interest thereon from February 7, 1908, and a certain claim of the State of New York for \$2,543.33 with interest thereon from January 15, 1908, if said claims, or either of them, shall be finally adjudged to be entitled to priority of payment over the principal and interest of said bonds, but not otherwise, and including also so much of the debts, obligations, and liabilities, whether in contract or in tort, of the receiver in this cause, remaining unpaid at the date of said sale and accrued interest thereon, as shall not be paid and satisfied by said receiver out of moneys in his hands applicable to the payment of such debts, obligations, and liabilities:

and the said receiver is hereby authorized and directed to  
109 apply to the payment of his said debts, obligations, and liabilities all moneys remaining in his hands at the date of said sale, and any and all moneys thereafter received by him upon any claim or demand existing on that date in his favor or in favor of said railroad company, or accruing prior to that date under or by reason of any contract to which he or said railroad company was a party, or arising out of his operation of the property sold prior to said sale; and

(5) The remainder of said sum of \$26,000,000 shall be applied, in the manner provided in said decree of foreclosure and sale, to the payment of the sums due for principal and interest upon the bonds and coupons mentioned in paragraph first of said decree, ratably

in proportion to the amounts due and unpaid on said bonds and coupons, respectively, without preference of one bond or the interest due thereon over any of the others.

Sixth. That said special master be, and he hereby is, authorized and directed to accept and receive from said purchasers the said sum of \$600,000 in cash which said purchasers offer to pay to him, as aforesaid, on account of said purchase price; and to accept and receive the said bonds of the face value of \$36,737,000 and all unpaid coupons appertaining thereto, so offered by said purchasers, and to apply said bonds and coupons, together with the said bonds of the face value of \$250,000 and the coupons for all unpaid interest thereon, so deposited by said purchasers at said sale, and any and all other bonds certified and outstanding under said mortgage, with the coupons appertaining thereto, which said purchasers may  
110 hereafter deliver to said special master in part payment of said purchase price on account of the residue of said purchase price, above the amount which shall be required to be paid in cash, at such price or value as shall be equivalent to the sum which would be payable out of the net proceeds of said sale, if made in money, to the holders of said bonds and coupons for their just share or proportion of such net proceeds upon a due accounting and apportionment and distribution of such net proceeds, and that the bonds so to be delivered shall be subsequently stamped with the amount of such credit when ascertained and finally determined by the further order of this court.

The purchasers may pay and discharge any of the debts and obligations mentioned in subdivisions 1, 2, 3, and 4 of paragraph fifth of this decree of confirmation, and upon such payment shall be credited on account of the purchase price payable by said purchasers under paragraph fourth hereof with such part thereof as may be allowed by the special master or approved by the court, and shall pay to the said special master, as and when directed by the order of this court, such sum or sums as may be necessary to pay and discharge any unpaid residue of said debts and obligations, and the amounts which, under subdivision 5 of said paragraph fifth, may be adjudged to be payable in cash to holders of bonds not delivered by said purchasers.

All sums of money and all bonds and coupons received by the special master from the purchasers shall be deposited by him with the Central Trust Company of New York, to be held by it subject to the order of this court; and a certificate of deposit issued by the said Central Trust Company of New York for bonds and  
111 coupons of the Third Avenue Railroad Company certified and outstanding under the mortgage mentioned in paragraph first of said decree of foreclosure and sale, may be received and accepted by the special master as representing the bonds and coupons mentioned in such certificate without requiring the physical delivery to him of such bonds and coupons.

Seventh. That said special master be, and he hereby is, authorized and directed, out of the said sum of \$600,000 in cash, when received by him, to pay to himself the sum of \$1,842.70, the amount of his disbursements upon said sale, and the sum of \$3,500, hereby awarded to him as compensation for his services in respect of said sale, and to apply the residue of said sum of \$600,000, as and when directed by order of this court, to or towards the payment of the several sums by the preceding fifth paragraph of this decree of confirmation directed to be paid out of said proceeds of sale of said property, other than the compensation and disbursements of said special master.

Eighth. That upon delivery by the said purchasers to the special master, as hereinbefore provided, of bonds of the face value of \$36,737,000 of said The Third Avenue Railroad Company duly certified and outstanding under the mortgage mentioned in paragraph first of said decree of foreclosure and sale, in negotiable form payable to bearer or endorsed or assigned in blank, and all unpaid coupons appertaining thereto, in addition to the said \$250,000 face value of such bonds deposited with said special master by said purchasers at the time of said sale, and upon payment by the said purchasers to said special master of the said sum of \$600,000 in cash on account of their said bid of \$26,000,000, the said Howard

112 Taylor, special master, be, and he hereby is, authorized and directed to sign, seal, execute, acknowledge, and deliver a deed or deeds granting, assigning, and conveying to the said James N. Wallace, Adrian Iselin, and Harry Brommer, as joint tenants and not as tenants in common, all the said property sold to them as aforesaid, subject, however, to the lien of the first mortgage of said The Third Avenue Railroad Company to The Farmers' Loan & Trust Company as trustee, dated July 1, 1887, and recorded in the office of the register of the county of New York on November 11th, 1887, in liber 2220 of mortgages, at page 380, to secure an issue of \$5,000,000 bonds, and to the amount due for principal and interest of the bonds issued and outstanding and secured thereby at the date of said sale; and subject to all valid taxes and valid assessments, not heretofore paid by the receiver or by said purchasers, and valid liens prior to the lien of the said mortgage referred to in paragraph first of said decree of foreclosure and sale, now existing in favor of any person or corporation not a party to this cause, except such as are by said decree of foreclosure and sale and by paragraph fifth of this decree of confirmation specifically directed to be paid out of the proceeds of the sale of said property; and subject, also, to the payment by said purchasers, their grantees, or assigns, as and when directed by order of this court in the manner provided in this decree of confirmation, of any unpaid part of said sum of \$26,000,000, being the purchase price of said property, and any further sums which may be adjudged to be payable by them; and subject also to all other terms, provisions, reservations, and conditions of said

113 decree of foreclosure and sale and of this decree of confirmation, and subject to the further condition that the court may

retake and resell the property sold, or any part thereof, in case the purchasers, their grantees, or assigns, shall fail, within thirty days after service thereof, to comply with any order of this court directing the payment of any balance of the purchase price remaining unpaid or any other sum subject to the payment whereof said property shall be conveyed, or directing compliance with any of the other terms, provisions, reservations, or conditions of said decree of foreclosure and sale or of this decree of confirmation.

That as a further assurance to said purchasers, their grantees and assigns, under said deed or deeds to be executed to them by the special master, the defendant The Third Avenue Railroad Company shall, at the request of said purchasers, their grantees or assigns, join with said special master in the execution of said deed or deeds, or make, execute, acknowledge, and deliver to said grantees a separate deed or deeds, and thereby grant, convey, and release to such purchasers, their grantees and assigns, all its estate, right, title, and interest in and to the property and franchises so sold as aforesaid; that the Central Trust Company of New York, as trustee under said mortgage mentioned in paragraph first of said decree of foreclosure and sale, shall likewise either join in such deed or deeds executed by the special master, or shall execute, acknowledge, and deliver to said purchasers its separate deed or deeds and any and all other proper instruments of assignment, and thereby grant, assign, and release to the said purchasers, their grantees and assigns, all its estate, right, title, and interest under said mortgage in and to the property so sold; and, further, that the receiver in this cause of the Third

114 Avenue Railroad Company shall join in such deed or execute, acknowledge, and deliver a separate deed or deeds and any and all other proper instruments of conveyance and assignment, and grant, convey, transfer, and assign to such purchasers, their grantees and assigns, all his estate, right, title, and interest as said receiver in or to the property conveyed to the purchasers by the special master and in and to any property and franchises which he may have acquired as such receiver in the management or operation of said property or by the use of the income, increase, or proceeds thereof, or of any part thereof, and in or to the property and franchises so sold, including all railways, franchises, cars, equipment, structures, supplies, claims, bills receivable, rights of action, leases or leasehold estates, contracts, and property of every description whether or not in said deed or in said decree of sale specifically described, including all cars, equipment, and other property acquired by the receiver with the proceeds of receiver's certificates issued by the receiver or for which the receiver has incurred other indebtedness or obligations to be paid or satisfied by the purchasers.

That the draft deed submitted to the court and filed herewith is hereby approved by the court, and that the special master, the Central Trust Company of New York as trustee as aforesaid, the defendant The Third Avenue Railroad Company, and the said receiver are hereby authorized and directed to unite in said deed, or to execute,

knowledge, and deliver another deed or other deeds substantially the tenor of said draft deed so approved and filed, and such other instrument or instruments of assignment and conveyance as  
115 may be necessary or proper to vest in said purchasers, their grantees and assigns, the property so sold to them or any part thereof.

That the custody and possession of such of the property sold to said purchasers as is in the possession or under the control of said receiver shall be retained by this court through its said receiver, and such of the property so sold as is now in the possession or under the control of the said Central Trust Company of New York, as trustee under said mortgage mentioned in paragraph first of said decree of foreclosure and sale, shall remain in the custody and possession of said trust company subject to the further order of this court, notwithstanding the execution and delivery of such deed or deeds or instruments, until the court shall order the delivery of possession thereof, or of any part thereof, to the said purchasers, their grantees or assigns.

Ninth. That upon the payment by said purchasers, their grantees or assigns, of the whole of said sum of \$26,000,000 by them bid for the said property, or such sum or sums on account thereof as the court may require as a condition of the delivery to them of possession of said property, the said purchasers, their grantees or assigns, shall be let into possession of said property, and the receiver, or any person or corporation having possession thereof, shall deliver over to said purchasers, their grantees or assigns, all the property conveyed by such deed or deeds which may be in his or their possession, together with the income and proceeds thereof at any time received by him or them; and this court hereby reserves the right by order to be made at the foot of this decree to deliver the whole or any part  
of said property to said purchasers, their grantees or assigns,  
116 before the payment and satisfaction of all the sums, or the

full performance of all the things, by said decree of foreclosure and sale and this decree of confirmation required to be paid and done, upon such terms and conditions or upon such security as the court may deem sufficient to secure the payment of all sums then remaining unpaid and the performance of any unfulfilled obligations.

Tenth. That upon such delivery of such property or portions thereof to said purchasers, their grantees or assigns, the said purchasers, their grantees or assigns, shall hold, possess, and enjoy the same and all rights, privileges, and franchises appertaining thereto, free and discharged (save only as reserved and provided in said decree of foreclosure and sale and in this decree of confirmation, and such orders in respect thereof as the court shall hereafter make) from all equity of redemption of said defendant The Third Avenue Railroad Company, and of every person, firm, and corporation having or claiming rights or equities in or to the said property and franchises, and every part and parcel thereof, and from each and all the



claims and liens of all the parties to this suit, and each of them, and of those claiming under them.

Eleventh. That Howard Taylor, Esq., be, and he hereby is, appointed special master to ascertain and report to this court in respect of the following matters, namely:

(1) The several sums payable out of the fund arising from said sale as provided in the fifth paragraph of this decree of confirmation;

(2) The sums, if any, payable by said purchasers in addition to said purchase price of \$26,000,000;

117 (3) The accounts of the receiver in this cause down to the first day of March, 1910, the date of said sale;

(4) The distributive shares of the proceeds of said sale payable to the holders of bonds certified and outstanding under the mortgage mentioned in paragraph first of said decree of foreclosure; and

(5) The amount of the deficiency herein.

Said special master shall take proofs as to the said several matters upon such notice to the parties or their solicitors as he shall deem proper, and from time to time shall report all such proofs, together with his conclusions and recommendations, to this court with all convenient speed.

Twelfth. That the purchasers shall be entitled to any and all property and money received and collected by said receiver subsequent to the first day of March, 1910, being the date of said sale, not applied by him to the payment of his debts, obligations, and liabilities as aforesaid, including all income, revenues, profits, and proceeds arising from the operation of said property by said receiver subsequent to the date of said sale, and shall be liable for and shall pay all the debts and obligations incurred by him, whether in contract or in tort, subsequent to the date of said sale.

Upon publication by the receiver, when ordered by the court, of a notice requiring holders of any claims against the receiver to present the same for allowance, any such claims which shall not be so presented or filed within the time in that behalf specified in such notice

shall not be enforceable against the receiver or against the  
118 property sold as aforesaid, or against the said purchasers, their grantees or assigns.

Thirteenth. That jurisdiction of this cause and of the subject matters of said decree of foreclosure and sale and of this decree of confirmation is reserved for the purpose of enforcing all the terms, provisions, requirements, reservations, and conditions of said decree of foreclosure and sale and of this decree of confirmation, and full power is reserved to the court, notwithstanding such conveyance and delivery of possession of the properties sold, to retake and resell said properties, if the purchasers, their grantees, or assigns shall fail or neglect to perform or to comply with any of the provisions of said decree of foreclosure and sale and of this decree of confirmation, and of the terms, provisions, reservations, and conditions of the deed or deeds or other instruments of conveyance to be executed to the purchasers as aforesaid; that all questions not herein fully determined and disposed of are hereby reserved for further consideration



and adjudication, the present settlement of such questions being held not to be necessary for the purposes of this decree, and that any party hereto and the purchasers, their grantees or assigns, from time to time, may make such applications as he or they may deem proper at the foot of this decree.

New York, April 13th, 1910.

E. HENRY LACOMBE,  
U. S. C. J.

119

RECEIVER'S EXHIBIT 4.

*Deed, dated April 18th, 1910.*

Howard Taylor, as special master; Frederick W. Whitridge, as receiver of the Third Avenue Railroad Company; and Central Trust Company of New York, as trustee under the first consolidated mortgage made by the Third Avenue Railroad Company, to James N. Wallace, Adrian Iselin, and Harry Bronner.

It is hereby stipulated and agreed, for the purposes of the appeal taken herein from the order of February 7th, 1912 (in order to avoid the necessity of printing said deed in full in the record thereon, this stipulation to be printed as a part of said record in lieu thereof), that by deed, dated April 18th, 1910, and executed by Howard Taylor, as special master, Frederick W. Whitridge, as receiver of the Third Avenue Railroad Company, and Central Trust Company of New York, as trustee under the first consolidated mortgage made by the Third Avenue Railroad Company, Howard Taylor, as special master, "granted, sold, assigned, conveyed, transferred, and released \* \* \* all and singular, the property, estate, rights, franchises, contracts, privileges, and choses in action of said the Third Avenue Railroad Company, including all the railroads, premises, and property of said the Third Avenue Railroad Company situated, lying, or being in the borough of Manhattan in the city of New York, or elsewhere, including" \* \* \* (here follows in the deed a full description

120 tion of the property conveyed), to James N. Wallace, Adrian Iselin, and Harry Bronner, it being intended to include in said conveyance as expressly stated in said deed, all the property of every nature and description at the time of said sale on the first day of March, 1910, owned, or in any wise belonging, to said the Third Avenue Railroad Company and all the property of every nature and description at any time in any manner subject to said first consolidated mortgage, including all property held by any person or corporation whatsoever, in trust, or impressed with a trust, or as security thereunder, for the payment of the bonds secured thereby; and all property of every nature and description at that time in the possession, or under the control, of said Frederick W. Whitridge, as receiver as aforesaid, or to which he was entitled as such receiver, whether or not such property was specifically mentioned or described in said decree of foreclosure and sale or in the inventories filed pursuant thereto, or in the notice of said sale, or in said deed; and Fred-

erick W. Whitridge, as receiver as aforesaid, granted, conveyed, assigned, transferred, and released unto said James N. Wallace, Adrian Iselin, and Harry Bronner, all his estate, right, title, and interest as such receiver in and to the property mentioned or described in said deed and conveyed, or intended to be conveyed, by the said Howard Taylor, as special master, including all property and franchises which the said Frederick W. Whitridge may have acquired as such receiver, in the management or operation of said property and franchises, or by the use of the income, increase or proceeds thereof, or any part thereof, including all railways, franchises, equipment, structures, supplies, claims, bills receivable, rights of action, leases or leasehold estates, contracts, and property of every description, whether or not in said deed, or in said decree of foreclosure and sale, or in said inventories, or notice of sale, specifically described, and including all cars, equipment, and other property acquired by the said receiver with the proceeds of receiver's certificates issued by the said receiver, or for which said receiver has incurred other indebtedness or obligations to be paid or satisfied by said Wallace, Iselin, and Bronner; and Central Trust Company of New York, as trustee under said first consolidated mortgage, granted, conveyed, assigned, transferred, and released to the said James N. Wallace, Adrian Iselin, and Harry Bronner, all its estate, right, title, claim, and interest, as trustee under said first consolidated mortgage, in and to the property and franchises conveyed or intended to be conveyed by the said Howard Taylor, as special master.

The right to refer to the whole of said deed upon the argument of said appeal is hereby reserved to either party, and it is further stipulated that copies thereof may be handed up to the judges hearing such appeal at the time of said argument and used by counsel for either party if they should so desire.

Dated, New York, May 2, 1912.

HENRY A. WISE, *United States Attorney.*

EVARTS, CHOATE & SHERMAN,

*Solicitors for Frederick W. Whitridge, as receiver of the property of the Third Avenue Railroad Company covered by its first consolidated mortgage and as receiver of other companies.*

122

*Opinion.*

United States District Court. (Ex. C. C.) Southern District of New York.

The Pennsylvania Steel Company and others v. New York City Railway Company and another (and three other actions).

Central Trust Company v. The Third Avenue Railroad Company and others (and three other actions).

These are applications made by the United States attorney for the Southern District of New York, on behalf of the collector of internal

revenue for orders of this court requiring its officers, Messrs. Joline and Robinson, as receivers of the Metropolitan Street Railway Company, and Mr. Whitridge, as receiver of the Third Avenue Railroad Company (and of other street railway companies) to make and file returns for the years 1909 and 1910 "for the said companies of their, and each of their net incomes," in the manner and form required by section 38 of the tariff act of August 5, 1909, the section known as the corporation tax law.

The section reads as follows:

123 "Sec. 38. That every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State \* \* \* shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company, or association or insurance company, equivalent to one per centum of the entire net income over and above \$5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies, or associations or insurance companies subject to the tax hereby imposed."

For the U. S.: Addison S. Pratt, John N. Boyle, Assistant U. S. Attys.

For Metropolitan receivers: Arthur H. Masten, William M. Coleman, James C. Tryon.

For Third Ave. receiver: Evarts, Choate & Sherman, H. T. Bickford.

LACOMBE, C. J.:

The question here presented was considered somewhat hastily in *Penn. Steel Co. v. N. Y. City Ry.*, 176 F. R., 471, 477. With the assistance of the exhaustive briefs which have been submitted, it has been given much more careful attention, but no reason is apparent for reaching a conclusion different from that already expressed.

When it is conceded, as it must be under *Flint v. Stone Tracy Co.*, 220 U. S., 107, that this tax is not imposed upon the property nor upon the franchises under which the railroad is operated in the different streets and avenues, most of the cases cited by the Government become inapplicable. Of course the corporation could not avoid this tax by turning over its property and the operation of its road to some agent or trustee who is the mere alter ego of the corporation, but that is not this case. Receivers are sometimes referred to as the representatives of the corporations, but that expression is not exactly accurate. In receiverships of this sort the corporate life still continues, the corporation may go on electing officers and preserving its organization. Its property (including the franchises under which its road is operated) has been seized by the court,

and is held for the benefit of creditors or persons entitled to it; sometimes the property thus seized is sold by order of the court, but such sale does not include the franchise of the debtor to be a corporation and to do business in a corporate capacity with the privileges thereby secured to it, as pointed out in *Flint v. Stone Tracy Co.*, *supra*, p. 161.

It does not seem to me that Congress, while avoiding carefully any taxation of the property of the corporation, intended to impose a tax upon the income realized from the assets of a bankrupt corporation, whose property had been taken over by a court, through its officers, to be marshalled and distributed. Certainly the language used does not indicate any such intent.

The motion is denied.

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*Order denying petition.*

United States District Court for the Southern District of New York.

CENTRAL TRUST COMPANY OF NEW YORK, COM-  
plainant,

*v.*

THE THIRD AVENUE RAILROAD COMPANY, NEW YORK  
City Railway Company, Adrian H. Joline, and  
Douglas Robinson, as receivers of the New York  
City Railway Company; Metropolitan Street Rail-  
way Company, Adrian H. Joline, and Douglas  
Robinson, as receivers of the Metropolitan Street  
Railway Company; the Pennsylvania Steel Com-  
pany, the Degnon Contracting Company, and Mor-  
ton Trust Company, as trustee under the refund-  
ing mortgage, dated March 21, 1902, made by the  
Metropolitan Steel Railway Company, defendants.

} Equity 2-90.

AMERICAN HAY COMPANY, COMPLAINANT,

*v.*

DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD  
Company, defendant.

} Equity 2-119.

126 THE BARBER ASPHALT PAVING COMPANY, COM-  
plainant,

*v.*

THE FORTY-SECOND STREET, MANHATTANVILLE, AND  
St. Nicholas Avenue Railway Company, defendant.

} Equity 2-121.

THE LORAIN STEEL COMPANY, COMPLAINANT,

*v.*

UNION RAILWAY COMPANY OF NEW YORK CITY,  
defendant.

} Equity 2-190.

In the matter of the application of the United States of America for an order directing Frederick W. Whitridge, appointed receiver in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910, for the Third Avenue Railroad Company, Dry Dock, East Broadway and Battery Railroad Company, Union Railway Company of New York City, and the  
 127 Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, of their and each of their net income to the collector of internal revenue for the district in which each of the said corporations had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909. (36 Stat. L., 112.)

The above-entitled causes having come on further to be heard on the 15th day of December, 1911, upon the petition of the United States of America duly verified September 18, 1911, for an order directing Frederick W. Whitridge as receiver of the Third Avenue Railroad Company, and as receiver of the Dry Dock, East Broadway & Battery Railroad Company, and as receiver of the Union Railway Company of New York City, and as receiver of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, to make a true and accurate return for the years 1909 and 1910 for each of said companies of their, and each of their, net income for the said years to the collector of internal revenue for the third internal revenue collection district of the State of New York in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112) :

Now, on reading the said petition of the said United States of America, duly verified September 18, 1911, and the notice of said motion thereon, with proof of service of said notice and of a copy of said petition on Messrs. Evarts, Choate & Sherman, solicitors for Frederick W. Whitridge as receiver of the Third  
 128 Avenue Railroad Company; Messrs. Bowers & Sands, solicitors for the Union Railway Company of New York City, Dry Dock, East Broadway and Battery Railroad Company, Central Trust Company of New York as trustee, and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company; Messrs. Davies, Auerbach, Cornell & Barry, solicitors for the Third Avenue Railroad Company; James L. Quackenbush, Esq., solicitor for New York City Railway Company; J. Parker Kirlin, Esq., solicitor for Metropolitan Street Railway Company; Messrs. Masten & Nichols, solicitors for Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company; Messrs. Byrne & Cutcheon, solicitors for the Pennsylvania Steel Company and the Degnon Contracting Company; Bronson Winthrop, Esq., solicitor for Morton Trust Company, as trustee; Messrs. Dexter, Osborn & Fleming, solicitors for William W. Ladd, as receivers of New York City Railway Company; Messrs. Guggenheimer, Untermeyer & Marshall, solicitors for American Surety Company; Honorable Thomas Carmody, attorney general of the

State of New York, Daniel Burke, Esq., solicitor for American Hay Company; Henry M. Ward, Esq., and Nathan Ottinger, Esq., solicitors for certificate holders' committee of the Dry Dock, East Broadway and Battery Railroad Company; Messrs. Geller, Rolston & Horan, solicitors for Farmers' Loan and Trust Company, as trustee under the general first mortgage of the Dry Dock, East Broadway and Battery Railroad Company, and as successor to Morton Trust Company, as trustee under the mortgage of Metropolitan Street Railway Company, dated March 21, 1902; Messrs. Merrill & Rogers, counsel in certain contract claims for Frederick W. Whitridge, as receiver of the Forty-second Street, Manhattanville and  
129 St. Nicholas Avenue Railway Company; Messrs. Kellogg & Rose, solicitors for Barber Asphalt Paving Company; Messrs. Miller, King, Lane & Trafford, solicitors for Union Trust Company of New York, as trustee; Messrs. Stetson, Jennings & Russell, solicitors for the Lorain Steel Company; Messrs. Eaton, Lewis & Rowe, solicitors for General Electric Company; Messrs. Bravath, Henderson & DeGersdorff, solicitors for Metropolitan Securities Company; Honorable Archibald R. Watson, corporation counsel, city of New York, solicitor for the city of New York; Sumner Bowman, Esq., solicitor for United States Fidelity and Guaranty Company; Messrs. Guthrie, Bangs & Van Sinderen, solicitors for James M. Wallace, Adrian Iselin, and Harry Bronner, filed in the office of the clerk of this court on the 27th day of January, 1912, in support of said motion, and the answer of the said Frederick W. Whitridge, as receiver of the property of the Third Avenue Railroad Company mortgaged by its first consolidated mortgage or deed of trust, dated May 15, 1900, and as receiver of the Dry Dock, East Broadway and Battery Railroad Company; and as receiver of the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company; and as receiver of the property of said the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company mortgaged by its second or income mortgage dated July 1st, 1885; and as receiver of the Union Railway Company of New York City, duly verified October 26, 1911, and filed in the office of the clerk of this court on the 5th day of February, 1912, in opposition thereto, and after hearing Addison S. Pratt, Esq., and John N. Boyle, Esq., of counsel for the petitioner, the United States of America, in support of said motion; and Herbert J. Bickford, Esq., of counsel for Frederick W. Whitridge, as receiver as aforesaid, in opposition  
130 thereto, and due deliberation having been thereupon had, on motion of Evarts, Choate & Sherman, solicitors for Frederick W. Whitridge, as receiver of the property of the Third Avenue Railroad Company mortgaged by its first consolidated mortgage or deed of trust dated May 15, 1900, and as receiver of the Dry Dock, East Broadway and Battery Railroad Company; and as receiver of the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company; and as receiver of the property of said the Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company

mortgaged by its second or income mortgage dated July 1st, 1885; and as receiver of the Union Railway Company of New York City, it is

Ordered that the said motion of the United States of America for an order directing Frederick W. Whitridge, as receiver of the Third Avenue Railroad Company; and as receiver of the Dry Dock, East Broadway & Battery Railroad Company; and as receiver of the Union Railway Company of New York City; and as receiver of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, to make a true and accurate return for the years 1909 and 1910 for each of said companies of their, and each of their, net income for the said years to the collector of internal revenue for the third internal-revenue collection district of the State of New York, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112), be and the same hereby is in all respects denied.

Dated, New York, February 7th, 1912.

E. HENRY LACOMBE,  
U. S. C. J.

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*Assignment of errors.*

United States District Court, Southern District of New York.

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,  
v.

THE THIRD AVENUE RAILROAD COMPANY; NEW YORK City Railway Company; Adrian H. Joline and Douglas Robinson as receivers of the New York City Railway Company; Metropolitan Street Railway Company; Adrian H. Joline and Douglas Robinson as receivers of the Metropolitan Street Railway Company; the Pennsylvania Steel Company; the Dednon Contracting Company; and Morton Trust Company as trustee under the refunding mortgage dated March 21, 1902, made by the Metropolitan Street Railway Company, defendants.

In equity.

AMERICAN HAY COMPANY, COMPLAINANT,  
v.

DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD Company, defendant.

In equity.

132 THE BARBER ASPHALT PAVING COMPANY, COMPLAINANT,  
v.

THE FORTY-SECOND STREET, MANHATTANVILLE, AND ST. Nicholas Avenue Railway Company, defendant.



THE LORAIN STEEL COMPANY, COMPLAINANT,	}
v.	
UNITED RAILWAY COMPANY OF NEW YORK CITY, defendant.	

In the matter of the application of the United States of America for an order directing Frederick W. Whitridge, appointed receiver in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910 for the Third Avenue Railroad Company; Dry Dock, East Broadway and Battery Railroad Company; Union Railway Company of New York City; 133 and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, of their and each of their net income to the collector of internal revenue for the district in which each of the said corporations had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909. (36 Stat. L., 112.)

*Assignment of errors.*

Comes now the United States of America, petitioner in the above-entitled proceeding, by Henry A. Wise, United States attorney for the southern district of New York, its solicitor, and makes and files the following assignment of errors which it alleges occurred upon the denial of its petition and in the entry and filing of the final order and decree herein dated the 7th day of February, 1912:

First. The court erred in dismissing the petition of the United States herein, duly verified the 18th day of September, 1911.

Second. The court erred in denying the petition of the United States herein, duly verified the 18th day of September, 1911.

Third. The court erred in refusing to grant the application contained in the said petition of the United States, duly verified the 18th day of September, 1911, for an order directing Frederick W. Whitridge, appointed receiver in each of the above-entitled actions,

to make a true and accurate return for the years 1909 and 134 1910 for the Third Avenue Railroad Company; Dry Dock, East Broadway and Battery Railroad Company; Union Rail-

way Company of New York City; and the Forty-Second Street, Manhattanville and St. Nicholas Avenue Railway Company, of their and each of their net income to the collector of internal revenue for the district in which each of the said corporations had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909. (36 Stat. L., 112.)

Fourth. The court erred in not finding that Frederick W. Whitridge, appointed receiver in each of the above-entitled actions, was required, as a principal officer of the Third Avenue Railroad Company; Dry Dock, East Broadway and Battery Railroad Company; Union Railway Company of New York City; and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company for the years 1909 and 1910, by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112), to make the true and accurate return contemplated and provided for by the said section of the said act of Congress.

Fifth. That the court erred in not deciding and holding that corporations in the hands of receivers conducting the business of, and operating and exercising all the rights, privileges, and franchises of such corporations under the orders of the court appointing them were subject to the provisions of section 38 of the act of Congress of August 5, 1909. (36 Stat. L., 112.)

Sixth. That the court erred in not deciding and holding that the Third Avenue Railroad Company; the Dry Dock, East Broadway and Battery Railroad Company; Union Railway Company of  
135 New York City, Manhattanville and St. Nicholas Avenue  
Railway Company, corporations in the hands of a receiver appointed in each of the above-entitled actions, who was conducting and carrying on the business of, and operating and exercising all the rights, privileges, and franchises of, said corporations, under the orders of the court appointing him, were subject to the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112); and the court erred in not deciding and holding that the net income, within the meaning of said section 38 of the said act of Congress, received by the said receiver from conducting and carrying on the business of the said corporation as aforesaid was subject to the payment of the tax provided for in section 38 of the said act of August 5, 1909.

Dated, New York, April 23, 1912.

HENRY A. WISE,

*United States Attorney for the Southern District of New York,  
Solicitor for Petitioner. Office and post-office address, Room 50,  
U. S. Court and P. O. Bldg., Borough of Manhattan, New York  
City.*

SIRS: Please take notice that the above assignment of errors was duly filed herein on the 26th day of April, 1912.

HENRY A. WISE,

*U. S. Attorney.*

By the Honorable Henry E. Lacombe, circuit judge of the United States for the second circuit, greeting:

To Union Railway Company of New York City, Dry Dock, East Broadway and Battery Railroad Company, Central Trust Company of New York, as trustee, and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company. The Third Avenue Railroad Company. New York City Railway Company. Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company and as receivers of Metropolitan Street Railway Company. The Pennsylvania Steel Company. Degnon Contracting Company. Morton Trust Company, as trustee. William W. Ladd, as receiver of New York City Railway Company. American Surety Company. Attorney General of the State of New York. American Hay Company. N. Y. Certified Holders Committee of the Dry Dock, East Broadway and Battery Railroad Company. Farmers' Loan and Trust Company, as trustee under the general first mortgage of the Dry Dock, East Broadway and Battery Railroad Company, and as successor to Morton Trust Company, as trustee under the mortgage of Metropolitan Street Railway Company, dated March 21, 1902. Frederick W. Whitridge, as receiver of The Third Avenue Railway Company, Union Railway Company of New York City, and Dry Dock, East Broadway and Battery Railroad Company. Frederick W. Whitridge, as receiver of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company. Barber Asphalt Paving Company. Union Trust Company of New York, as trustee. Lorain Steel Company. General Electric Company. Metropolitan Securities Company. City of New York. United States Fidelity and Guaranty Co. James M. Wallace, Adrian Iselin, and Harry Bronner.

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the second circuit, to be holden at the borough of Manhattan in the City of New York, in the district and circuit above named, on the 6th day of May, 1912, pursuant to a notice of appeal filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein United States of America are appellants and you are appellees, to show cause, if any there be, why the order and decree in said notice of appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 30th day of April, in the year of our Lord one thousand nine hundred twelve, and of the independence of the United States the one hundred and thirty-sixth.

[L. S.]

E. HENRY LACOMBE,

*Judge of the United States for the Second Circuit.*

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*Stipulation as to record.*

United States District Court, Southern District of New York.

CENTRAL TRUST COMPANY OF NEW YORK, COMPLAINANT,

*v.*

THE THIRD AVENUE RAILROAD COMPANY; NEW YORK City Railway Company; Adrain H. Joline and Douglas Robinson, as receivers of the New York City Railway Company; Metropolitan Street Railway Company; Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company; The Pennsylvania Steel Company; The Degnon Contracting Company; and Morton Trust Company, as trustee under the refunding mortgage dated March 21, 1902, made by the Metropolitan Street Railway Company, defendants.

In equity.

AMERICAN HAY COMPANY, COMPLAINANT,

*v.*

DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD Company, defendant.

In equity.

139 THE BARBER ASPHALT PAVING COMPANY, COMPLAINANT,

*v.*

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS Avenue Railway Company, defendant.

THE LORAIN STEEL COMPANY, COMPLAINANT,

*v.*

UNION RAILWAY COMPANY OF NEW YORK CITY, DEFENDANT.

In the matter of the application of the United States of America for an order directing Frederick W. Whitridge, appointed receiver in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910 for the Third Avenue Railroad Company, Dry Dock, East Broadway and Battery Railroad Company, Union Railway Company of New York City, and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company, of their and each of their net income to the collector of internal revenue for the district in which each of the said corporations had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909. (36 Stat. L., 112.)

It is hereby stipulated and agreed that the appeal to the Circuit Court of Appeals in the above-entitled proceeding shall and may be heard upon the following papers; that is to say, the notice of motion

and petition of the United States, verified the 18th day of September, 1911, the answer of Frederick W. Whitridge, as receiver, verified the 26th day of October, 1911, stipulation dated May 2, 1912, with regard to the first consolidated mortgage of the Third Avenue Railroad Company to Morton Trust Company, as trustee, dated May 15, 1900, and decrees dated May 17, 1909, and April 13, 1910, in the suit entitled Central Trust Company of New York, complainant, v. the Third Avenue R. R. Co. et al., defendants, and stipulation dated May 2nd, 1912, with regard to the deed dated April 18, 1910, from Howard Taylor, as special master, Frederick Whitridge, as receiver, etc., and Central Trust Company of New York, as trustee, etc., to Messrs. Wallace, Iselin, and Bronner, all referred to in said answer, the opinion of Hon. E. Henry Lacombe, circuit judge, in the above-entitled proceeding, and the order of Hon. E. Henry Lacombe, circuit judge, dated the 7th day of February, 1912, in the above-entitled proceeding, the assignment of errors, dated the 23rd day of April, 1912, and the notice of appeal by the United States, dated the 23rd day of April, 1912, the citation herein, and this stipulation as to record on appeal.

Dated New York, April 23, 1912.

HENRY A. WISE,

*United States Attorney for the Southern District  
of New York, Solicitor for Petitioner.*

BOWERS & SANDS,

*Solicitors for the Union Railway Company of New York City, Dry Dock, East Broadway and Battery Railroad Company, Central Trust Company of New York, as Trustee, and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company.*

DAVIES, AUERBACH, CORNELL & BARRY,

*Solicitors for the Third Avenue Railroad Company.*

JAMES L. QUACKENBUSH,

*Solicitor for New York City Railway Company.*

MASTENS & NICHOLS,

*Solicitors for Adrian H. Joline and Douglas Robinson, as Receivers of New York City Railway Company and as Receivers of Metropolitan Street Railway Company.*

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BYRNE & CUTCHEON,

*Solicitors for the Pennsylvania Steel Company and the Degnon Contracting Company.*

BRONSON WINTHROP,

*Solicitor for Morton Trust Company, as Trustee.*

J. PARKER KIRLIN,

*Solicitor for Metropolitan Street Railway Company.*

DEXTER, OSBORNE & FLEMING,

*Solicitors for William W. Ladd, as Receiver of New York City Railway Company.*

GUGGENHEIMER, UNTERMYER & MARSHALL,  
*Solicitors for American Surety Company.*

THOMAS CARMODY,  
*Attorney General of the State of New York.*

DANIEL BURKE,  
*Solicitor for American Hay Company.*

HENRY M. WARD,  
NATHAN OTTINGER,

*Solicitors for Certified Holders Committee of the Dry  
Dock, East Broadway and Battery Railroad Company.*

GELLER, ROLSTON & HORAN,  
*Solicitors for Farmers' Loan and Trust Company, as Trustee under the General First Mortgage of the Dry Dock, East Broadway and Battery Railroad Company, and as Successor to Morton Trust Company, as Trustee, under the Mortgage of Metropolitan Street Railway Company, dated March 21, 1902.*

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EVARTS, CHOATE & SHERMAN,  
*Solicitors for Frederick W. Whitridge, as receiver of the Third Avenue Railroad Company; Union Railway Company of New York City; Dry Dock, East Broadway and Battery Railroad Company; and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company.*

KELLOGG & ROSE,  
*Solicitors for Barber Asphalt Paving Company.*

MILLER, KING, LANE & TRAFFORD,  
*Solicitors for Union Trust Company  
of New York, as Trustee.*

STETSON, JENNINGS & RUSSELL,  
*Solicitors for the Lorain Steel Company.*

EATON, LEWIS & ROWE,  
*Solicitors for General Electric Company.*

CRAVATH, HENDERSON & DE GERSDORF,  
*Solicitors for Metropolitan Securities Company.*

ARCHIBALD R. WATSON,  
*Corporation Counsel, City of New York,  
Solicitor for the City of New York.*

SUMNER BOWMAN,  
*Solicitor for United States Fidelity and Guaranty Co.*

GUTHRIE, BANGS & VAN SINDEREN,  
*Solicitors for James M. Wallace, Adrian Isclin,  
and Harry Bronner.*

*Clerk's certificate.*

United States of America,  
Southern district of New York, } ss.

I, Thomas Alexander, clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 144, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled the Central Trust Company of New York v. the Third Avenue Railroad Co. et al., Adrian H. Joline and Douglas Robinson, as receivers, etc., and three other cases. In the matter of the application of the United States of America, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 6th day of May, in the year of our Lord one thousand nine hundred and twelve, and of the independence of the said United States the one hundred and thirty-sixth.

THOMAS ALEXANDER, *Clerk.*

145 United States Circuit Court of Appeals for the Second Circuit.

No. 241-242—October term, 1911. Argued May 20, 1912. Decided July 18, 1912.

THE PENNSYLVANIA STEEL COMPANY  
et al., complainants.

*vs.*

THE NEW YORK CITY RAILWAY COM-  
pany et al., defendants.

THE UNITED STATES, APPELLANT. (COR-  
poration income tax.)

THE CENTRAL TRUST COMPANY OF NEW  
York, complainant,

*vs.*

THE THIRD AVENUE RAILROAD COMPANY  
et al., defendants.

THE UNITED STATES, APPELLANT. (COR-  
poration income tax.)

Appeals from the District  
Court of the United  
States for the Southern  
District of New York.  
Before Coxe, Ward, and  
Noyes, circuit judges.

On appeal from an order of the United States District Court for the Southern District of New York entered February 7th, 1912, denying the motion, made by the United States, for an  
146 order directing the receivers of the various railway corporations operating in the city of New York to make a true and accurate return of net income for the years 1909 and 1910, for each



of the said corporations, respectively, to the collector of internal revenue, pursuant to the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112). The questions in each of these actions are identical and, to save unnecessary repetition, may be considered in the case of the Metropolitan Street Railway Company.

Henry A. Wise, U. S. attorney, and Addison S. Pratt and John N. Boyle, assistant U. S. attorneys, for appellant.

Evarts, Choate and Sherman and Herbert J. Bickford, for Whitridge, receiver.

Arthur H. Masten and Ellis W. Leavenworth, for Joline and Robinson, receivers.

COXE, J.

The facts are undisputed. The question is one of law, and may be epitomized as follows:

Are receivers of an insolvent corporation, duly appointed by a court of equity, which corporation was not engaged in business when the taxing act was passed and has done no business since, required to make returns and pay taxes upon the income realized by them while acting as officers of the court and under its direction?

Section 38, so far as it is applicable to the present controversy provides that every corporation organized for profit and having a capital stock represented by shares, shall be subject to pay annually a special excise tax, with respect to the carrying on or doing business by such corporation, equivalent to one per centum upon the entire net income, over and above five thousand dollars, received by it from all sources during such year exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies, subject to the tax hereby imposed.

The act further provides that a true and accurate return under oath or affirmation of its president, vice president, or  
 147 other principal officer, and its treasurer or assistant treasurer, shall be made by the corporation to the collector for the district in which such corporation has its principal place of business, setting forth the amount of its paid-up capital stock, the amount of its bonded and other indebtedness, the gross amount of its income received during the year from all sources, the amount received by way of dividends, the total amount of all ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and the total amount of all losses actually sustained during the year. The act also provides for an accurate return of the interest paid during the year on the bonded and other indebtedness of the corporation, the amount paid by it for taxes and its net income after making the deductions authorized by the act.

The act in question, levying, as it does, a tax upon the citizen, must be strictly construed; it can not be enlarged by construction to

cover matters not clearly within its purport. The question is not what Congress might have done or should have done, but what it actually did do. When this is ascertained the duty of the court is accomplished. We are of the opinion that the act is inapplicable to receivers for the following reasons:

First. The taxation of business done and income received by receivers is not contemplated by the act; receivers are not mentioned. This omission can not be attributed to inadvertence. The lawmakers unquestionably understood the situation; they knew that corporations frequently become bankrupt and are placed in the hands of receivers, and yet no provision in the act relates to this contingency. It is not improbable that the intention was to avoid the decision of the Supreme Court in the Pollock case by confining the tax strictly to the doing of business in a corporate capacity. Whatever the reason may have been, the fact remains that the doing of business by receivers in their representative capacity as officers of the court is not taxed by the act, and no provision is made therein for the ascertainment and collection of such a tax.

Second. There can be no doubt that the special excise tax provided for by the act is imposed as a tax upon doing business in a corporate capacity. In other words, if an enterprise be carried on through the instrumentality of a corporation, it must pay for the privilege. We so understand the decision of the Supreme Court upholding the act in question in *Flint v. Stone Tracy Co.*, 220 U. S., 107. The court says:

"The tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof. \* \* \* When imposed in this manner it is a tax upon the doing of business with the advantages which is here in the peculiarities of corporate or joint-stock organizations of the character described. \* \* \* It may be described generally as a tax upon doing of business in a corporate capacity. \* \* \* The tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax measured by the standard prescribed. As was said in the *Thomas case*, 192 U. S., 363, *supra*, the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

If the business be carried on by an individual or a partnership, no tax is imposed. It is only when the parties interested seek the advantages and protection which a corporation, or a joint-stock association, affords that the tax is payable. This proposition was decided in *Zonne v. Minneapolis Syndicate*, 220 U. S., 187. The court says:

"The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of the reorganization from any activity in respect to it. We are of opinion

that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909."

Third. The act, in all its provisions, clearly contemplates that  
149 the tax is to be paid by a corporation which is actually engaged in business as an actively operating concern. It nowhere intimates that the tax can be collected unless the corporation is carrying on the business.

The net income upon which the tax is levied is to be ascertained by deducting from the gross income of the corporation expenses, losses, and interest on the corporation's bonded or other indebtedness and amounts actually paid by it for taxes and received by it as dividends upon stock of other corporations which are subject to taxation under the law. The return required by the act is to be verified by the president, vice president, or other principal officer, and the treasurer or assistant treasurer of the corporation, and must contain a statement of the corporation's financial condition in all particulars required by law. If the return is found to be incorrect, the act provides for further information by an examination of any officer or employee. The corporation is to be notified of the amount for which it is liable, and if it fails to make a return or makes a false or fraudulent return it shall be liable to a penalty. It can not be held that an act which nowhere mentions receivers and which in every paragraph deals with corporations and joint-stock companies actually engaged in business can, by construction, be made to cover the business, temporarily undertaken, of conserving the property of such a corporation for the benefit of its creditors and the public.

Fourth. It is manifest that the functions of the Metropolitan Street Railway Company as a corporation was superseded when all its property was placed in the hands of receivers by a court of equity in order that it might be saved for the benefit of all its creditors. It could no longer act in its corporate capacity; it could no longer operate the railroad; it lost, for the time at least, all dominion over its property. Its officers could not make the return required by the act for the obvious reason that the corporation had carried on no business during the years 1909 and 1910, and therefore had received no income from any source. The receivers could not make the return for the reason that they were neither the corporation nor the representatives thereof. During their administration the Metropolitan company has not been carrying on corporate business and has received no income in that capacity. They were in possession as officers of  
150 the court and were subject to its orders. Whatever corporate functions the company possessed were in abeyance during the period that the court held the property for the benefit of all the creditors.

Assuming that a net income could arise in such circumstances, and assuming further that Congress could constitutionally levy "a special excise tax with respect to carrying on the business of such corporation," we are clearly of the opinion that it has failed to do so under the present act.

Fifth. We have been presented by the United States attorney with an elaborate and learned brief showing great research and citing many cases involving the construction of State statutes, most of them arising in the State courts of New York, Pennsylvania, New Jersey, and Massachusetts. We agree, however, with the court below in thinking that "when it is conceded, as it must be under *Flint v. Stone Tracy Co.*, 220 U. S., 107, that this tax is not imposed upon the property nor upon the franchises under which the railroad is operated in the different streets and avenues, most of the cases cited by the Government became inapplicable."

We are, of course, bound by the law as enunciated by the Supreme Court, and we think that the decisions of that tribunal and of the other Federal courts cited by counsel sustain the conclusions reached.

The orders appealed from are affirmed.

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151 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York, on the 28th day of July, one thousand nine hundred and twelve.

Present: Hon. Alfred C. Coxe, Hon. Henry G. Ward, Hon. Walter C. Noyes, *Circuit Judges*.

Central Trust Company of New York, complainant, vs. Third Avenue Railroad Company et al., defendants. The United States, appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said district court be and it hereby is affirmed.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

W. C. N.

152 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Central Trust Co. vs. Third Ave. Ry. Co. (corporation tax). Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 30, 1912. William Parkin, clerk.

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153 United States of America.

*Southern District of New York, ss:*

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 152 inclusive, contain a true and complete

transcript of the record and proceedings had in said court, in the case of Central Trust Company of New York, complainant, against Third Avenue Railroad Company, et al, defendants, The United States, appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 10th day of February, in the year of our Lord one thousand nine hundred and thirteen, and of the independence of the said United States the one hundred and thirty-seventh.

[SEAL.]

WM. PARKIN, *Clerk.*

154

United States of America, ss:

The President of the United States of America.

To the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit,

Greeting:

Being informed that there is now pending before you a suit in which the United States of America is appellant and Frederick W. Whitridge, receiver of the property of the Third Avenue Railroad Company, etc., is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Southern ———, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

155 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 13th day of March, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY.

*Clerk of the Supreme Court of the United States.*

156 (Endorsed:) File No. 23558. Supreme Court of the United States, No. 938, October term, 1912. The United States, petitioner, vs. F. W. Whitridge, receiver, etc. Writ of certiorari. United States Circuit Court of Appeals. Second Circuit. Filed March 31, 1913. William Parkin, clerk.

157 In the Supreme Court of the United States, October Term, 1912.

THE UNITED STATES, PETITIONER,	}	No. 983.
<i>vs.</i>		
FREDERICK W. WHITRIDGE, RECEIVER, ETC., ET AL., respondents.		

*Stipulation as to return to writ of certiorari.*

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted therein.

March 14, 1913.

J. C. McREYNOLDS,  
*Attorney General.*

JOSEPH H. CHOATE, JR.,  
*Counsel for Frederick W. Whitridge, as receiver of the  
Third Ave. Railroad Company & other companies.*

(Endorsed:) U. S. vs. Whitridge. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 31, 1913. William Parkin, clerk.

158 To the honorable the Supreme Court of the United States:  
Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, March 31st, 1913.

WM. PARKIN,  
*Clerk of the United States Circuit Court  
of Appeals for the Second Circuit.*

159 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. United States v. F. W. Whitridge, as rec'r., etc. Return to certiorari. Office of the clerk, Supreme Court U. S. Received Apr. 3, 1913.

160 (Endorsed:) File No. 23558. Supreme Court U. S., October Term, 1912. Term No. 983. The United States, petitioner, vs. F. W. Whitridge, rec'r., etc. Writ of certiorari and return. Filed April 3, 1913.

18

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~. 1913

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No. ~~804~~ 467

THE UNITED STATES, PETITIONER,

VS.

ADRIAN H. JOLINE AND DOUGLAS ROBINSON, AS RECEIVERS OF THE METROPOLITAN STREET RAILWAY COMPANY ET AL.

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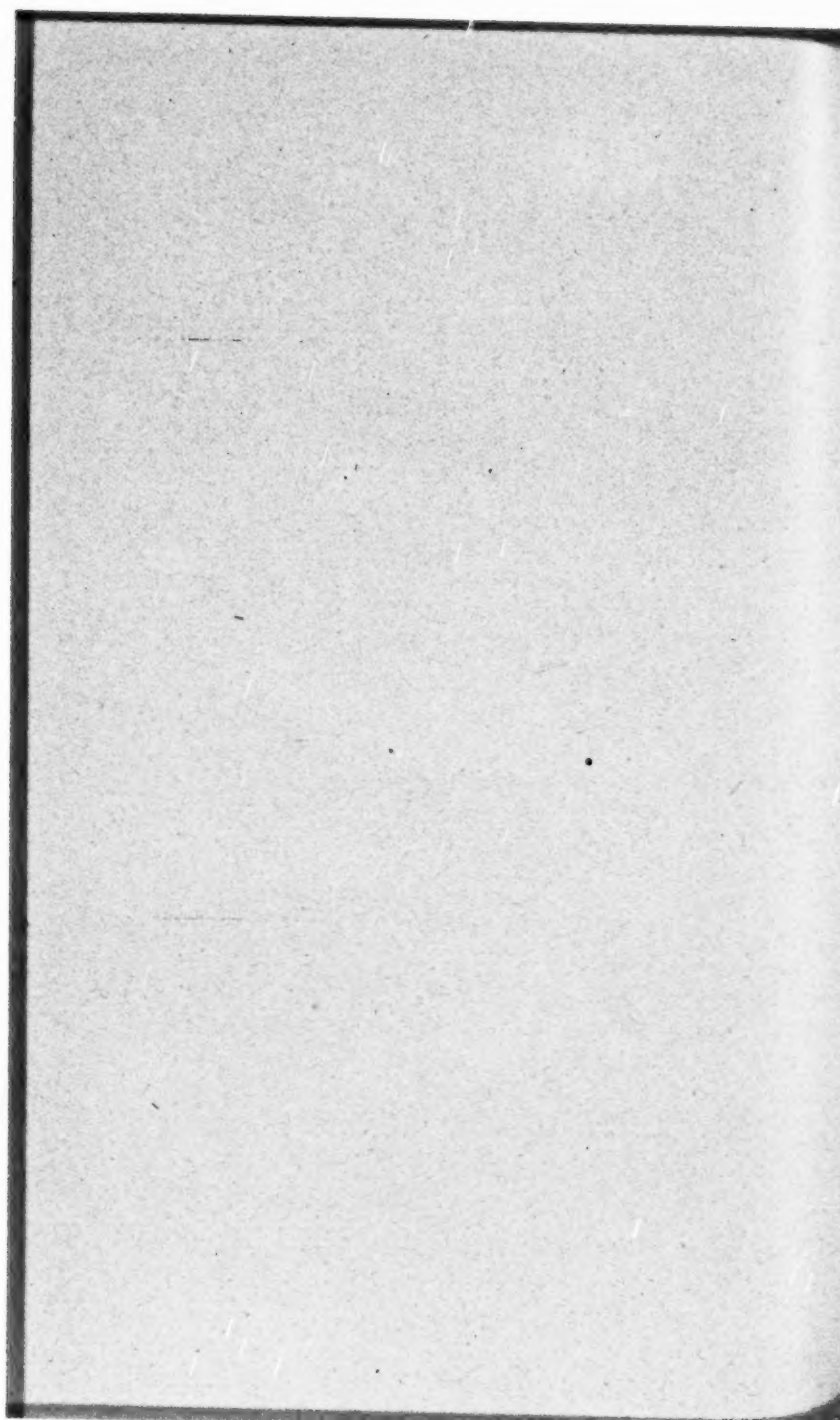
ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR CERTIORARI FILED FEBRUARY 20, 1913.  
CERTIORARI AND RETURN FILED APRIL 3, 1913.

(23559)





# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 984.

THE UNITED STATES, PETITIONER.

vs.

ADRIAN H. JOLINE AND DOUGLAS ROBINSON, AS RECEIVERS OF THE METROPOLITAN STREET RAILWAY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a *United States Circuit Court of Appeals for the Second Circuit.*

THE PENNSYLVANIA STEEL COMPANY ET AL.,  
COMPLAINANTS,

*against*

NEW YORK CITY RAILWAY COMPANY, DEFENDANT,  
AND THREE OTHER ACTIONS.

TRANSCRIPT OF RECORD.

On appeal from the District Court of the United States for the  
Southern District of New York.

1 *Notice and allowance of appeal.*

United States District Court, Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY ET AL.,  
complainants,

*against*

NEW YORK CITY RAILWAY COMPANY, DE-  
fendant.

Equity No. 2-9.

THE FARMERS' LOAN AND TRUST COMPANY, AS  
trustee, successor of the Morton Trust Com-  
pany, as trustee, complainant,

*against*

METROPOLITAN STREET RAILWAY COMPANY  
et al., defendants.

Equity No. 2-33.

GUARANTY TRUST COMPANY OF NEW YORK,  
complainant,

*against*

METROPOLITAN STREET RAILWAY COMPANY  
et al., defendants.

Equity No. 2-149.

2 THE FARMERS' LOAN AND TRUST COM-  
pany, as trustee, successor of Morton  
Trust Company, as trustee, complainant,

*against*

METROPOLITAN STREET RAILWAY COMPANY  
et al., defendants.

Equity No. 3-37.

In the matter of the application of the United States of America for  
an order directing Adrian H. Joline and Douglas Robinson, ap-  
pointed receivers in each of the above-entitled actions, to make  
a true and accurate return for the years 1909 and 1910 for the  
Metropolitan Street Railway Company of its net income to the  
collector of internal revenue for the second district of New York,

in which district the said corporation had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112).

3       SIRS: Please take notice that the petitioner herein, the United States of America, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final order and decree of the United States Circuit Court for the Southern District of New York, in the above-entitled proceeding, dated the 7th day of February, 1912, and entered in the office of the clerk of this court on the same day, and from each and every part of the said decree.

Dated New York, April 30, 1912.

HENRY A. WISE,

*United States Attorney for the Southern District of  
New York, Solicitor for the Petitioner.*

Office and post-office address, room 50, U. S. Court and P. O. Building, borough of Manhattan, city of New York.

To Thomas Alexander, Esq., clerk of the U. S. District Court for the Southern District of New York. J. Parker Kirlin, Esq., solicitor for Metropolitan Street Railway Company, 27 William Street, New York City. Messrs. Masten & Nichols, solicitors for Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company, 49 Wall Street, New York City. James L. Quackenbush, Esq., solicitor for New York City Railway Company,

4       21 Park Row, New York City. Messrs. Dexter, Osborn & Fleming, solicitors for William W. Ladd, as receiver of New York City Railway Company, 71 Broadway, New York City. Messrs. Byrne & Cutcheon, solicitors for the Pennsylvania Steel Company and Degnon Contracting Company, 24 Broad Street, New York City. Messrs. O'Brien, Boardman & Platt, solicitors for John D. Crimmins et al., as committee of contract creditors, 2 Rector Street, New York City. Messrs. Davies, Stone & Auerbach, solicitors for Guaranty Trust Company of New York, 32 Nassau Street, New York City. Messrs. Geller, Rolston & Horan, solicitors for the Farmers' Loan and Trust Company, as trustee, successor of Morton Trust Company, as trustee, etc., 20 Exchange Place, New York City. Bronson Winthrop, Esq., counsel for the Farmers' Loan and Trust Company, as trustee, successor of Morton Trust Company, as trustee, etc., 32 Liberty Street, New York City. Charles Benner, Esq., solicitor for Benjamin S. Catchings et al., as a committee of tort creditors of New York City Railway Company, 100 Broadway, New York City.

5       Messrs. Simpson, Thatcher & Bartlett, solicitors for John I. Waterbury et al., as a committee under Metropolitan Street Railway Company stockholders' protective agreement, 62 Cedar Street, New York City. Messrs. Strong & Mellen, solicitors for Central Park, North and East River Railroad Company, 27 William

Street, New York City. Messrs. Cravath, Henderson & De Gersdorf, solicitors for Central Crosstown Railway Company, 52 William Street, New York City. Michael Kirtland, Esq., solicitor for the Eighth Avenue Railroad Company and the Ninth Avenue Railroad Company, 2 Wall Street, New York City. Honorable Thomas Carmody, attorney general of the State of New York, 299 Broadway, New York City. Honorable Archibald R. Watson, corporation counsel of the city of New York, solicitor for the city of New York, Hall of Records, New York City.

The foregoing appeal is hereby allowed.

April 30, 1912.

E. HENRY LACOMBE.

*U. S. Circuit Judge.*

6

*Notice of motion.*

In the Circuit Court of the United States for the Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY ET AL.,  
complainants,

*against*

NEW YORK CITY RAILWAY COMPANY, DE-  
fendant.

Equity No. 2-9.

THE FARMERS' LOAN AND TRUST COMPANY, AS  
trustee, successor of Morton Trust Company,  
as trustee, complainant,

*against*

METROPOLITAN STREET RAILWAY COMPANY  
et al., defendants.

Equity No. 2-33.

GUARANTY TRUST COMPANY OF NEW YORK,  
complainant,

*against*

METROPOLITAN STREET RAILWAY COMPANY  
et al., defendants.

Equity No. 2-149.

7 THE FARMERS' LOAN AND TRUST COMPANY,  
as trustee, successor of Morton Trust  
Company, as trustee, complainant,

*against*

METROPOLITAN STREET RAILWAY COMPANY, ET AL.,  
defendants.

Equity No. 3-37.

In the matter of the application of the United States of America for an order directing Adrian H. Joline and Douglas Robinson, appointed receivers in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910 for the Metropolitan Street Railway Company of its net income to the collector of internal revenue for the second district of New York, in which district the said corporation had its principal place of

business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L. 112).

8       Sirs: Please take notice that upon the annexed petition of the United States of America, verified the 17th day of November, 1911, and upon all the pleadings, papers, and proceedings herein, application will be made at a term of the United States Circuit Court for the Southern District of New York, to be held on the 24th day of November, 1911, in the United States courthouse and post-office building, in the Borough of Manhattan, city of New York, for an order directing Adrian H. Joline and Douglas Robinson, appointed receivers in each of the four above-entitled actions, to make a true and accurate return for the years 1909 and 1910 for the Metropolitan Street Railway Company, of its net income for the said years, to the collector of internal revenue for the second internal revenue collection district of the State of New York, the district in which the said corporation had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L. 112), and for such other and further relief in the premises as justice may require.

Dated, New York, November 17th, 1911.

Yours, etc.,

HENRY A. WISE,

*United States Attorney for the Southern District  
of New York, solicitor for the petitioner.*

Office and post-office address, Room 50, U. S. Court House and P. O. Building, Borough of Manhattan, City of New York.

9       To J. Parker Kirlin, Esq., solicitor for Metropolitan Street Railway Company, 27 William Street, New York City. Messrs. Masten & Nichols, solicitors for Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company, 49 Wall Street, New York City. James L. Quackenbush, Esq., solicitor for New York City Railway Company, 21 Park Row, New York City. Messrs. Dexter, Osborn & Fleming, solicitors for William W. Ladd, as receiver of New York City Railway Company, 71 Broadway, New York City. Messrs. Byrne & Cutcheon, solicitors for The Pennsylvania Steel Company and The Degnon Contracting Company, 24 Broad Street, New York City. Messrs. O'Brien, Boardman & Platt, solicitors for John D. Crimmins et al., as a Committee of Contract Creditors, 2 Rector Street, New York City.

10       Messrs. Davies, Stone & Auerbach, solicitors for Guaranty Trust Company of New York, 32 Nassau Street, New York City. Messrs. Geller, Rolston & Horan, solicitors for The Farmers' Loan and Trust Company, as trustee, successor of Morton Trust Company, as trustee, etc., 20 Exchange Place, New York City. Bronson Winthrop, Esq., counsel for The Farmers' Loan and Trust Company, as trustee, successor of Morton Trust Company, as trustee, etc., 32 Liberty Street, New York City. Charles Benner, Esq., solicitor for



Benjamin S. Catchings et al., as a committee of tort creditors of New York City Railway Company, 100 Broadway, New York City. Messrs. Simpson, Thatcher & Bartlett, solicitors for John I. Waterbury et al., as a committee under Metropolitan Street Railway Company stockholders' protective agreement, 62 Cedar Street, New York City. Messrs. Dykman, Oeland & Kuhn, solicitors for Central Park, North and East River Railroad Company, 177 Montague Street, Brooklyn, N. Y. Messrs. Cravath, Henderson & De Gersdorf, solicitors for Central Crosstown Railway Company, 52 William Street, New York City. Michel Kirtland, Esq., solicitor for The Eighth Avenue Railroad Company and The Ninth Avenue Railroad Company, 2 Wall Street, New York City. Honorable Thomas Carmody, Attorney General of the State of New York, 299 Broadway, New York City. Honorable Archibald R. Watson, corporation counsel of the city of New York, solicitor for the city of New York, Hall of Records, New York City.

12

*Petition.*

In the Circuit Court of the United States for the Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY, ET AL.,  
complainants,

*against*

NEW YORK CITY RAILWAY COMPANY, DE-  
fendant.

} Equity No. 2-9.

THE FARMERS' LOAN AND TRUST COMPANY, AS  
trustee, successor of Morton Trust Company,  
as trustee, complainant,

*against*

METROPOLITAN STREET RAILWAY COMPANY,  
et al., defendants.

} Equity No. 2-33.

GUARANTY TRUST COMPANY OF NEW YORK, COM-  
plainant,

*against*

METROPOLITAN STREET RAILWAY COMPANY,  
et al., defendants.

} Equity No. 2-149.

13 THE FARMERS' LOAN AND TRUST COM-  
pany, as trustee, successor of Morton  
Trust company, as trustee, complainant,

*against*

METROPOLITAN STREET RAILWAY COMPANY  
et al., defendants.

} Equity No. 3-37.

In the matter of the application of the United States of America for an order directing Adrian H. Joline and Douglas Robinson, appointed receivers in each of the above-entitled actions, to make

a true and accurate return for the years 1909 and 1910 for the Metropolitan Street Railway Company of its net income to the collector of internal revenue for the second district of New York, in which district the said corporation had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112).

14     *To the honorable the judges of the United States Circuit Court for the Southern District of New York:*

The petition of the United States of America, appearing by Henry A. Wise, United States attorney for the southern district of New York, its solicitor, respectfully shows to this honorable court on information and belief as follows:

*First.*—That the Metropolitan Street Railway Company is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that in the years 1909 and 1910 it had and still has its principal place of business in the borough of Manhattan, city, county, and State of New York, in the second internal revenue collection district of the State of New York; that it is a street railway corporation organized for profit long prior to the year 1909, and having a capital stock represented by shares, and that in the years 1909 and 1910 it was engaged in business in the city, county, and State of New York.

*Second.*—That on the 24th day of September, 1907, Adrian H. Joline, Esq., and Douglas Robinson, Esq., were duly appointed temporary receivers of the New York City Railway Company, defendant in the first above-entitled action, and of all its property, assets, etc., by an order of this court dated and entered on that day in the first above-entitled action, a copy of which said order is hereto annexed, marked "Exhibit A," and made a part hereof, to which reference is hereby made for the terms of their appointment.

15     *Third.*—That thereafter and on the first day of October, 1907, the Metropolitan Street Railway Company presented its petition to this court praying that it might become a party defendant to the first above-entitled action, for the protection of its interests and those of its creditors, and that the receivership under the bill of complaint in the first above-entitled action might be extended so as expressly to embrace the interests of the said Metropolitan Street Railway Company in the property covered by the said receivership, the said Metropolitan Street Railway Company expressly by its said petition submitting itself and its property to the jurisdiction of this court; that on the said first day of October, 1907, an order was duly made and entered in the first above-entitled action granting the prayer of the said petition and extending the receivership aforesaid to the properties of the said petitioner as prayed in its petition, a copy of which said order is hereto annexed, marked "Exhibit B," and made a part hereof, to which reference is hereby made for the terms of the said receivership.

*Fourth.*—That thereafter and on the 9th day of October, 1907, an order was duly made and entered in the first above-entitled action appointing the said Adrian H. Joline and Douglas Robinson, who had theretofore been appointed temporary receivers of the said Metropolitan Street Railway Company, its property, assets, etc., permanent receivers thereof, a copy of which said order is hereto annexed, marked "Exhibit C," and made a part hereof, to which reference is hereby made for the terms of their appointment.

*Fifth.*—That on October 9, 1907, the Morton Trust Company filed in this court a bill of complaint in the second above-entitled action, leave having first been obtained of this court, against the said Metropolitan Street Railway Company and Adrian H. Joline and Douglas Robinson, as receivers thereof, and others, praying that a certain mortgage or deed of trust duly made, executed and delivered by the said Metropolitan Street Railway Company to it as trustee, dated March 21, 1902, might be decreed to be a valid lien upon the property therein described, and that the said Morton Trust Company had a right of entry into and upon all the property conveyed or intended to be conveyed by the said mortgage, and was entitled to have the income, rents, issues, and profits thereof applied in accordance with the provisions of the said mortgage, and that a receiver or receivers might be appointed, with the usual power of receivers in like cases, of the railroads, property, and premises covered by the said mortgage, and of the income, rents, issues, and profits thereof; that on the said 9th day of October, 1907, an order was duly made and entered by this court appointing the said Adrian H. Joline and Douglas Robinson, under the aforesaid bill of complaint in the second above-entitled action, receivers of all the railroads, properties, and premises covered by the said mortgage, and of all the income, rents, issues, and profits thereof, a copy of which said order is hereto annexed, marked "Exhibit D," and made a part hereof, to which reference is hereby made for the terms of their appointment.

*Sixth.*—That thereafter and on the 9th day of November, 1907, an order was duly made and entered by this court in the first above-entitled action, by which it was ordered, adjudged, and decreed, among other things, as follows:

"The court finds that the defendant, Metropolitan Street Railway Company, is insolvent, and that its assets and property of every description constitute a fund in which the creditors of said defendant are interested, and that the assets of said corporation should be marshalled and the nature and extent of the rights, liens, equities, and priorities of the several creditors thereof should be ascertained and decreed by the court."

*Seventh.*—That on the 9th day of November, 1907, the Morton Trust Company filed in this court a bill of complaint in the fourth above-entitled action for the foreclosure of the mortgage aforesaid from the said Metropolitan Street Railway Company to it, dated March 21, 1902, leave having been first obtained from this court, and on the 19th day of November, 1907, an order was duly made and entered by this court in the fourth above-entitled action, appointing

the said Adrian H. Joline and Douglas Robinson receivers of all the property covered by the said mortgage, and of the income, rents, issues, and profits thereof, a copy of which said order is hereto annexed, marked "Exhibit E," and made a part hereof, to which reference is hereby made for the terms of their appointment.

*Eighth.*—That on the 26th day of February, 1908, the Guaranty Trust Company of New York filed in this court a bill of complaint in the third above-entitled action, leave first having been obtained of this court, against the said Metropolitan Street Railway Company and Adrian H. Joline and Douglas Robinson as receivers thereof, and others, praying that a certain mortgage or deed of trust, duly made, executed, and delivered by the said Metropolitan Street Railway Company to it as trustee, dated February 1, 1897, might be decreed to be a valid lien upon the property therein described, and that an account be taken of such property, and that a receiver or receivers might be appointed with the usual powers of receivers  
18 in like cases, of the railroad's property and premises, mortgaged and pledged in the said mortgage, and of the income, rents, issues, and profits thereof; that on the 17th day of March, 1908, an order was duly made and entered by this court, appointing the said Adrian H. Joline and Douglas Robinson, under the aforesaid bill of complaint in the third above-entitled action, receivers of all the railroad's properties and premises covered by the said mortgage, and of all the income, rents, issues, and profits thereof, a copy of which said order is hereto annexed, marked "Exhibit F," and made a part hereof, to which reference is hereby made for the terms of their appointment.

*Ninth.*—That on the 24th day of July, 1908, an order was duly made and entered by this court in the four above-entitled actions, by which it was ordered, adjudged, and decreed, among other things, as follows:

"That Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company, be and they are hereby directed to surrender at midnight, between July 31, 1908, and August 1, 1908, to Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company, all the railroads, property, and franchises of the Metropolitan Street Railway Company, leased and demised under the lease of said Metropolitan Street Railway Company to said New York City Railway Company, dated February 14, 1902, together with all replacements thereof and additions thereto, and all the estate and interest of said New York City Railway Company under said lease, without prejudice, however, to any claim  
19 or demands of Metropolitan Street Railway Company or its receivers, against New York City Railway Company or its receivers, under said lease existing at the time of said surrender by reason of the breach of any of the provisions of said lease or otherwise; and that the said Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company, be, and they hereby are, authorized to accept such surrender and thereupon to run, manage, and operate the said railroads and property, to collect the

rents, income, tolls, and profits of the said railroads and property, and to exercise the authority and franchises of said defendant, Metropolitan Street Railway Company, and discharge its public duties, acting in all things subject to the supervision of this court, with all the powers and duties heretofore conferred or imposed on them by any order or orders of this court heretofore made in any of the above-entitled causes, so far as the same shall be applicable.

"That Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company, be, and they hereby are, authorized to transfer to Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company, all equipment, material, and supplies, if any, as may be necessary or convenient for the continued operation of the railroads and property therein directed to be surrendered, and the same shall be accounted for hereafter between the respective receivers under direction of the court upon notice to all parties in interest."

*Tenth.*—That on the 3d day of August, 1908, an order was  
20 duly made and entered by this court in the four above-entitled actions, by which the order aforesaid, dated and entered on the 24th day of July, 1908, was amended by adding at the end of paragraph "1" thereof the following:

"And Adrian H. Joline, Esq., and Douglas Robinson, Esq., are hereby appointed receivers of all the property of the Metropolitan Street Railway Company covered by the mortgage in process of foreclosure under the bill in the suit last above named, with like power and authority to that already conferred upon them in the prior suits and as is usual and proper in such cases."

*Eleventh.*—That the said Adrian H. Joline and Douglas Robinson, duly appointed receivers in each of the above-entitled actions as aforesaid, immediately upon their appointment took possession of all the assets and property of the said Metropolitan Street Railway Company, of every kind and nature whatsoever, and have ever since remained in possession thereof, and have acted and continued to act during the years 1909 and 1910 and ever since, pursuant to the terms of each of the said orders appointing them such receivers, since the respective dates of entry thereof; and during the years 1909 and 1910, and ever since, the business of the said Metropolitan Street Railway Company has been done, performed, and carried on by the said Adrian H. Joline and Douglas Robinson, as such receivers, their agents, employees, servants, etc., and by them alone.

*Twelfth.*—That the said Metropolitan Street Railway Company became subject by the provisions of sec. 38 of the act of Congress of  
21 August 5, 1909 (36 Stat. L., 112), to pay annually to the United States of America a special excise tax with respect to the carrying on or doing business by such corporation, and was required to make, on or before the first days of March, 1910 and 1911, respectively, a true and accurate return to the collector of internal revenue for the second internal revenue collection district of the State of New York, the district in which it had its principal place

of business, in the manner and form required by the provisions of the said section.

*Thirteenth.*—That by virtue of the appointment in each of the above-entitled actions of Adrian H. Joline and Douglas Robinson as receivers as aforesaid of the said Metropolitan Street Railway Company, its assets, property, etc., the said receivers took the place of the directors and officers of the said company, during the pendency of the above-entitled actions, to the same effect, and with the same liabilities, obligations, and duties as were and are imposed by law upon such directors and officers of the said Metropolitan Street Railway Company, and more particularly by the provisions of the said section.

*Fourteenth.*—That the said receivers have wholly failed and neglected and refused to file a true and accurate return, or any return, of the said Metropolitan Street Railway Company, as required by the provisions of the said section, for the years 1909 and 1910, and still refuse so to do.

*Fifteenth.*—That the said Metropolitan Street Railway Company made a statement in the nature of the true and accurate return required by the provisions of the said section to the collector of internal revenue for the second district aforesaid, verified on the 30th day of April, 1910, by Charles E. Warren, vice president, and  
22 D. C. Moorehead, treasurer, a copy of which statement in the nature of the return aforesaid, is hereto annexed and made a part hereof, marked "Exhibit G," to which reference is made as if herein at length set forth, and that the said statement in the nature of the return aforesaid was returned by the said collector of internal revenue to the said Metropolitan Street Railway Company with a notice to the effect that the receivers of the said company were the proper parties to make the return.

*Sixteenth.*—That the said Metropolitan Street Railway Company made a statement in the nature of the true and accurate return required by the provisions of the said section to the collector of internal revenue for the second district aforesaid, verified on the 23d day of February, 1911, by Charles E. Warren, vice president, and D. C. Moorehead, treasurer, a copy of which statement in the nature of the return aforesaid, is hereto annexed and made a part hereof, marked "Exhibit H," to which reference is made as if herein at length set forth, and that the said statement in the nature of the return aforesaid was returned by the said collector of internal revenue to the said Metropolitan Street Railway Company with a notice to the effect that the receivers of the said company were the proper parties to make the return.

Wherefore, deponent prays that an order be made by this court in each of the four above-entitled actions directing and requiring the said Adrian H. Joline and Douglas Robinson, as receivers of the aforesaid Metropolitan Street Railway Company, to make a true and accurate return, as required by section 38 of the said act of Congress, of its net annual income for the years ending December 31,



23 1909, and December 31, 1910, and that your petitioner may have such other and further relief in the premises as may be just and proper, and your petitioner will ever pray, etc.

HENRY A. WISE,

*United States Attorney for the Southern District of  
New York, Solicitor for Petitioner.*

Office and post-office address, room 50, Post-Office Building, borough of Manhattan, city of New York.

SOUTHERN DISTRICT OF NEW YORK,

*County of New York, State of New York, ss:*

Addison S. Pratt, being duly sworn, deposes and says: I am an assistant United States attorney for the southern district of New York, solicitor for the petitioner herein. I have read the foregoing petition and know the contents thereof, and the same is true of my own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds of my belief as to all matters not stated in the said petition on my knowledge are the records of this court in the four above-entitled actions, and correspondence between the solicitor for the petitioner and the collector of internal revenue for the southern district of New York.

ADDISON S. PRATT.

Sworn to before me this 17th day of November, 1911.

[SEAL.]

FREDERICK L. CAMPBELL,  
*Notary Public, Kings County.*

Certificate filed in New York County.

24 *Exhibit A.*

In the Circuit Court of the United States for the Southern District of  
New York.

THE PENNSYLVANIA STEEL COMPANY AND THE DEGNON	} In equity.
Contracting Company, complainants,	
<i>against</i>	
NEW YORK CITY RAILWAY COMPANY, DEFENDANT.	

And now, on this 24th day of September, 1907, this cause came on to be heard upon the bill of complaint and on the answer of the defendant thereto this day filed, upon motion for the appointment of a receiver, and after hearing James Byrne for the complainants and James L. Quackenbush for the defendant, and after due deliberation,

It was ordered, adjudged, and decreed that Adrian H. Joline, Esq., and Douglas Robinson, Esq., both of the city of New York, be, and they hereby are, appointed temporary receivers of the defendant, New York City Railway Company, and of all the property of the said



defendant, real, personal, and mixed, of whatsoever kind and description, and wheresoever situated, including all railroads owned, leased, or operated by said defendant, all tracks, terminal facilities, offices, shops, and all buildings and appurtenances of every kind; all cars and other rolling stock and equipment, tools, machinery,

25 furniture, fixtures, materials, and supplies, books of account, records, and other books, papers, and accounts; cash in bank, on deposit and in hand, moneys, debts, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income, accruing and to accrue, as well as all interests, easements, privileges and franchises, and all assets of every kind; that the said receivers be, and they hereby are, authorized immediately to take possession of the same and to run, manage, and operate the said railroads and properties in such manner as will, in their judgment, produce the most satisfactory results, so that the operation of the railroad system of the defendant shall be continued in the same manner as at present, and the public duties obligatory upon the defendant be in all respects discharged; and to exercise the authority and franchises of defendant and discharge its public duties and to preserve and protect its said system in proper condition and repair, and to protect the title and possession, and secure and develop the business of the same, and in their discretion to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents, and employees, and to make such payments and disbursements as may be needful and proper in so doing. That the said receivers be, and they hereby are, authorized to collect the rents, income, tolls, and profits of the said railroads and property, and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and they shall have power to redeem any and all securities of the defendant now pledged as security on loans of money, and shall have power to

26 borrow money if needful, in their judgment, in order to comply with this direction, and also, so far as may be needful, to pay off current necessities for labor and supplies, but for no other purpose without the further order of this court; and the said receivers are hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property and trust hereby reposed in them, and likewise to defend all actions instituted against them as receivers, and also to appear in and conduct the prosecution or defense of any suit now pending in any court against the defendant, the prosecution and defence of which will in the judgment of said receivers be necessary for the proper protection of the property placed in their charge, or the interests and rights of creditors connected therewith; and the said receivers are hereby authorized in their discretion, from time to time, out of the funds coming into their hands, to pay the expenses of operating the said properties and executing their trusts, and all taxes and assessments upon the said properties, or any part thereof, and all such rentals and installments as may fall or become

due for the use of any portion of said railroads and other property; and also to pay and discharge all claims arising from the previous operation of said properties as in their judgment, on examination, are proper to be paid as expenses of operation, and the current and unpaid pay rolls and vouchers and supply accounts incurred in the operation of said railroad system at any time within four months prior hereto. The said receivers are hereby required to open proper books of accounts, wherein shall be stated the earnings, expenses, receipts, and disbursements of their said trust, and preserve proper vouchers for all payments made by them on account thereof.

27 And it is further ordered that the bond of each of the said receivers in the sum of two hundred and fifty thousand dollars, conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property which may come into his hands and abide by and perform all things which he shall be directed to do, with sufficient sureties, to be approved of by a judge of this court, be forthwith filed in the office of the clerk of this court.

And it is further ordered, that each and every of the officers, directors, agents, and employees of the defendant, said New York City Railway Company, and all other persons whomsoever, be, and they are hereby, required and commanded forthwith, upon demand of the said receivers or their duly authorized agent, to turn over and deliver to said receivers or their duly constituted representative, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or in their hands or under his or their control, and each of said directors, officers, agents, and employees is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said receivers or their duly constituted representatives, in conducting the operation of the said system and in discharging their duties as receivers.

And the defendant, said New York City Railway Company, and its officers, directors, agents, and employees, and all other persons claiming to act by, through or under the defendant, and all other persons whomsoever are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the receivers are hereby appointed or interfering in any way to prevent the discharge of their duties or their operating the same, and any party in interest may apply for further direction.

28 And it is further ordered that the parties hereto show cause before this court at the United States Post Office Building in the city of New York on the 7th day of October, 1907, at two o'clock in the afternoon why the said receivership should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard.

Dated, New York, September 24, 1907.

E. HENRY LACOMBE,  
*United States Circuit Judge.*

In the Circuit Court of the United States for the Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY AND THE DEGNON Contracting Company, complainants, <i>against</i> NEW YORK CITY RAILWAY COMPANY, DEFENDANT.	}	In equity.
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In the matter of the petition of Metropolitan Street Railway Company.

On the 1st day of October, 1907, this cause came on to be heard upon the petition of Metropolitan Street Railway Company, to be made a party defendant in this suit and for other relief, on consideration whereof, and after hearing J. Parker Kirlin, for said petitioner, James Byrne, for the complainants, and James L. Quackenbush, for the defendant.

It is ordered that the petitioner, Metropolitan Street Railway Company, be and it hereby is made a party defendant in this cause.

It is further ordered that the receivership in this cause be, and the same hereby is, extended to the properties of said petitioner,  
30 Metropolitan Street Railway Company, as prayed in said petition, and that Adrian H. Joline and Douglas Robinson, heretofore appointed receivers in this cause, be and they hereby are appointed receivers of the properties of said petitioner, with the powers and duties prescribed by order entered in this cause September 24th, 1907, appointing them receivers in this cause.

And it is further ordered that each and every of the officers, directors, agents, and employees of said petitioner, Metropolitan Street Railway Company, and all other persons whomsoever be, and they are hereby, required and commanded forthwith, upon demand of said receivers or their duly authorized agent, to turn over and deliver to said receivers or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, or other property in his or their hands or under his or their control, and each of such directors, officers, agents, and employees is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said receivers or their duly constituted representatives, in conducting the operation of the said system and in discharging their duties as receivers.

And said petitioner, said Metropolitan Street Railway Company and its officers, directors, agents, and employees and all other persons claiming to act by, through, or under said petitioner and all other persons whomsoever are hereby enjoined from interfering in any way whatsoever with the possession or management of any part

of said property over which the receivers have been appointed or interfering in any way to prevent the discharge of their duties  
 31 or their operating the same; and any party in interest may apply for direction.

Dated, New York, October 1st, 1907.

E. HENRY LACOMBE,  
*U. S. Circuit Judge.*

*Exhibit C.*

In the Circuit Court of the United States for the Southern District  
 of New York.

THE PENNSYLVANIA STEEL COMPANY AND THE DEGNON	
Contracting Company, complainants,	
<i>against</i>	
NEW YORK CITY RAILWAY COMPANY AND METROPOLITAN	
Street Railway Company, defendants.	

And now, on this seventh day of October, 1907, this cause came on further to be heard upon the pleadings and upon the order made in this cause on the 24th day of September, 1907, directing that the parties hereto show cause why the receivership of the New York City Railway Company and of its property should not be continued during the pendency of this suit, and thereupon after hearing James Byrne, of counsel for complainants, James L. Quackenbush, of counsel for the defendant, New York City Railway Company, and J. Parker Kirlin, or counsel for the defendant, Metropolitan Street Railway Company.

32 It is ordered, adjudged, and decreed that Adrian H. Joline and Douglas Robinson, heretofore by said order of September 24, 1907, appointed temporary receivers of said defendant, New York City Railway Company, and of all the property of said defendant, be continued as receivers during the pendency of this suit of said defendant and of all the property of said defendant, real, personal, and mixed, of whatsoever kind and description and where-soever situated, including all railroads owned, leased, or operated by said defendant, all tracks, terminal facilities, offices, shops, and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, materials, and supplies, books of account, records, and other books, papers, and accounts, cash in bank, on deposit, and in hand, money, debts, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits, and income accruing and to accrue, as well as all interest, easements, privileges, and franchises, and all assets of every kind; that the said receivers be, and they hereby are, authorized to run, manage, and operate the said railroads and properties, to collect the rents, income,

tolls, and profits of the said railroads and property, and to exercise the authority and franchises of said defendant and discharge its public duties, acting in all things subject to the supervision of this court; and

It is further ordered, adjudged, and decreed that said receivers be, and they hereby are, authorized, in their discretion, to employ and discharge and fix the compensation of all attorneys, managers, superintendents, agents, and employees, and to make such payments

and disbursements as may be needful and proper in so doing:  
33 that the said receivers be, and they hereby are, authorized and empowered to institute and prosecute, in their own names or in the name of said New York City Railway Company, all such suits as may be necessary in their judgment for the proper protection of the trust estate and the discharge of their trust, and likewise to defend all actions instituted against them as receivers, and also to appear in and continue or defend any suits now pending in any court to which said defendant, New York City Railway Company, is a party, the continuance or defense of which will, in the judgment of said receivers, be necessary for the proper protection of the trust estate, or the interests and rights of creditors connected therewith.

And it is further ordered, adjudged, and decreed that said receivers be, and they hereby are, authorized in their discretion from time to time, out of the funds coming into their hands, to pay the expenses of operating the said properties and executing their trust and to make such repairs to said properties and premises as in their judgment may be necessary in order safely to conduct operations under this order; also, with the approval of this court, to pay all taxes and assessments upon the said properties or any part thereof, and all such rentals and installments as may fall or become due for the use of any portion of said railroads and other property; and also to pay and discharge the current and unpaid pay rolls incurred in the operation of said railroad system at any time within four months prior to their appointment; and also to pay and discharge the supply and construction accounts incurred in the operation of said railroad system and all such other claims arising from the previous operation of said properties as in their judgment, on examination, are proper to  
34 be paid as expenses of operation; provided, that no payment of such accounts or claims shall be made without the express order of this court.

The said receivers are hereby required to open proper books of account wherein shall be stated the earnings, expenses, receipts and disbursements of their said trust, and preserve proper vouchers for all payments made by them on account thereof.

And it is further ordered, that each and every of the officers, directors, agents and employees of the defendant, said New York City Railway Company, and all other persons whomsoever, be and they hereby are, required and commanded forthwith, upon demand of the said receivers or their duly authorized agent, to turn over and deliver

to said receivers or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, or other property in his or their hands, or under his or their control.

And the defendant New York City Railway Company, and its officers, directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever are hereby enjoined from interfering in any way whatsoever with the possession or management of any part of the property over which the receivers are hereby appointed or interfering in any way to prevent the discharge of their duties or their operating the same, and any party in interest may apply for further direction.

And it is further ordered, adjudged, and decreed, that said Adrian H. Joline and Douglas Robinson, heretofore by order entered in this cause on October 1, 1907, appointed also receivers of the prop-  
35 erties of the defendant, Metropolitan Street Railway Company, be, and they hereby are, continued as receivers during the pendency of this suit of the properties of said defendant, Metropolitan Street Railway Company, and of said defendant, and as such receivers shall have and may exercise in respect thereof the like rights, powers, and duties with respect to said defendant that such receivers are hereinbefore given with respect to the New York City Railway Company and its properties.

And it is further ordered that each and every of the officers, directors, agents, and employees of said defendant, Metropolitan Street Railway Company, and all other persons whomsoever, be, and they are hereby, required and commanded forthwith, upon demand of the said receivers or their duly authorized agent, to turn over and deliver to said receivers or their duly constituted representative, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, or other property in his or their hands, or under his or their control.

And said defendant, said Metropolitan Street Railway Company, and its officers, directors, agents, and employees, and all other persons claiming to act by, through, or under said petitioner, and all other persons whomsoever, are hereby enjoined from interfering in any way whatsoever with the possession or management of any part of said property over which the receivers have been appointed, or interfering in any way to prevent the discharge of their duties or their operating the same.

It is further ordered that the bonds in the sum of two hundred and fifty thousand dollars heretofore given by said receivers for the faithful performance of their duties and filed in this  
36 cause stand and be and the said bonds hereby are approved.

It is further ordered that the statement of the powers, duties, and rights of said receivers contained in this order supersedes, from and after the entry of this order, the statement thereof contained in said orders of September 24th, 1907, and October 1st, 1907.

It is further ordered that any party in interest may apply for further direction.

Dated New York, October 9th, 1907.

E. HENRY LACOMBE,  
*United States Circuit Judge.*

37

*Exhibit D.*

Circuit Court of the United States, for the Southern District of New York.

MORTON TRUST COMPANY, COMPLAINANT,  
*against*

METROPOLITAN STREET RAILWAY COMPANY, NEW YORK City Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company, the Pennsylvania Steel Company, and the Degnon Contracting Company, defendants.	}	In equity.
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This cause came on this day to be heard on motion of the complainant for the appointment of receivers, as prayed in the bill of complaint.

On said bill of complaint, after hearing Bronson Winthrop, Esq., for complainant, and J. Parker Kirlin, Esq., for defendant, Metropolitan Street Railway Company, Arthur H. Masten, Esq., for defendants Joline and Robinson, and notice of this application having been duly given to New York City Railway Company, the Pennsylvania Steel Company, and the Degnon Contracting Company, it is, on motion of Bronson Winthrop, Esq., solicitor for complainant,

38 Ordered, adjudged, and decreed that Adrian H. Joline and Douglas Robinson be, and they hereby are, appointed, under the bill of complaint in this cause, receivers of all the railroads, properties, and premises mortgaged and pledged under the mortgage dated March 21, 1902, made by the defendant, Metropolitan Street Railway Company, to the complainant, Morton Trust Company, as trustee, described in the bill of complaint in this cause, and of all the tolls, earnings, income, rents, issues, and profits of said railroad, property, and premises: that said receivers be, and they hereby are, authorized to run, manage, and operate the said railroads and properties, to collect the rents, income, tolls, issues, and profits of said railroads and property, to exercise the authority and franchises of said defendant, and discharge its public duties, acting in all things subject to the supervision of this court.

And it is further ordered, adjudged, and decreed that said receivers be, and they hereby are, authorized in their discretion to employ and



discharge and fix the compensation of all attorneys, managers, superintendents, agents, and employees, and to make such payments and disbursements as may be needful and proper in so doing; that the said receivers be, and they hereby are, fully authorized and empowered to institute and prosecute in their own names or in the name of said Metropolitan Street Railway Company, all such suits as may be necessary, in their judgment, for the proper protection of the trust estate and the discharge of their trust, and likewise to defend all actions instituted against them as receivers, and also to appear in and continue or defend any suits now pending in any court to

39 which said defendant, Metropolitan Street Railway Company, is a party, the continuation or defense of which will, in the judgment of said receivers, be necessary for the proper protection of the trust estate, or the interests and rights of creditors connected therewith.

And be it further ordered, adjudged, and decreed that said receivers be, and they are hereby, authorized in their discretion from time to time out of the funds coming into their hands, to pay the expenses of operating the said properties and executing their trusts, and to make such repairs to said properties and premises as in their judgment may be necessary in order safely to conduct said operation under this order.

The said receivers are hereby required to open proper books of account wherein shall be stated the earnings, expenses, receipts, and disbursements of their said trust and preserve proper vouchers for all payments made by them on account thereof.

It is further ordered that the said receivers shall forthwith file in the office of the clerk of this court the consent of the surety on the bonds of the said receivers already given in the suit of The Pennsylvania Steel Company and the Degnon Contracting Company against New York City Railway Company and Metropolitan Street Railway Company, that the said bonds shall apply and the liability of the said surety continue and exist also in this suit and in respect of any and all acts and transactions of the said receivers, whether under their original appointment or under their appointment in this suit, or in lieu thereof, that the said receivers file in this suit their joint and several bond in the sum of two hundred and fifty thousand dollars, conditioned that they will well and truly perform the duties of their office and duly account for all moneys or property which may

40 come into their hands and abide by and perform all things which they shall be directed to do, with sufficient sureties to be approved of by a judge of this court.

And it is further ordered that each and every of the officers, directors, agents, and employees of said defendant, Metropolitan Street Railway Company, be, and they are hereby, required and commanded forthwith upon demand of the said receivers or their duly authorized agent, to turn over and deliver to said receivers or their duly constituted representatives any of the said property in his or

their hands or under his or their control, provided, however, that the complainant shall be entitled to retain possession of any stocks, bonds, or securities pledged under said mortgage.

And said defendant, Metropolitan Street Railway Company, its officers, directors, agents, and employees, and all other persons claiming to act by, through, or under said defendant, and all other persons whatsoever, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the receivers are hereby appointed, or interfering in any way to prevent the discharge of their duties, and any party in interest may apply for further directions.

Dated New York, October 9, 1907.

E. HENRY LACOMBE,  
*U. S. Cir. J.*

41

*Exhibit E.*

Circuit Court of the United States, for the Southern District of New York.

MORTON TRUST COMPANY, COMPLAINANT,  
*against*

METROPOLITAN STREET RAILWAY COMPANY, NEW  
York City Railway Company, Adrian H. Joline  
and Douglas Robinson, as receivers of New York  
City Railway Company, Adrian H. Joline and  
Douglas Robinson, as receivers of Metropolitan  
Street Railway Company, the Pennsylvania Steel  
Company, and the Degnon Contracting Company,  
defendants.

In Equity. Eq.  
No. 2-33.

This cause came on this day to be heard on motion of the complainant for the appointment of receivers as prayed in the bill of foreclosure filed in this cause on November 9th, 1907.

On said bill, after hearing Bronson Winthrop, Esq., for complainant, James Byrne, Esq., for the defendants, the Pennsylvania Steel Company and the Degnon Contracting Company, and Arthur H. Masten, Esq., for the defendants, Adrian H. Joline and Douglas Robinson, as receivers, and notice of this application having been duly given to Metropolitan Street Railway Company and New York City Railway Company, it is, on motion of Bronson Winthrop, Esq., solicitor for complainant,

42 Ordered, adjudged, and decreed that Adrian H. Joline and

Douglas Robinson be, and they hereby are, appointed under the bill of complaint in this cause, filed on November 9th, 1907, receivers of all the railroads, properties, and premises, mortgaged and pledged under the mortgage dated March 21, 1902, made by the defendant, Metropolitan Street Railway Company, to the complainant, Morton Trust Company, as trustee, described in the bill of complaint in this cause, and of all the tolls, earnings, income, rents, issues, and profits of said railroad, property, and premises; that said receivers be, and they hereby are, authorized to run, manage, and

operate the said railroads and properties, to collect the rents, income, tolls, issues, and profits of said railroads and property, to exercise the authority and franchises of said defendant, and discharge its public duties, acting in all things subject to the supervision of this court.

And it is further ordered, adjudged, and decreed that said receivers be, and they hereby are, authorized in their discretion to employ and discharge and fix the compensation of all attorneys, managers, superintendents, agents, and employees, and to make such payments and disbursements as may be needful and proper in so doing; that the said receivers be, and they hereby are, fully authorized and empowered to institute and prosecute in their own names or in the name of said Metropolitan Street Railway Company, all such suits as may be necessary in their judgment for the proper protection of the trust estate, and the discharge of their trust, and likewise to defend all actions instituted against them as receivers, and also to appear

43 in and continue or defend any suits now pending in any court to which said defendant, Metropolitan Street Railway Company, is a party, the continuation or defense of which will, in the judgment of said receivers, be necessary for the proper protection of the trust estate, or for the interests and rights of creditors connected therewith.

And it is further ordered, adjudged and decreed, that said receivers be, and they are hereby, authorized in their discretion from time to time out of the funds coming into their hands to pay the expenses of operating the said properties and executing their trusts and to make such repairs to said properties and premises as in their judgment may be necessary in order safely to conduct said operation under this order.

The said receivers are hereby required to open proper books of account wherein shall be stated the earnings, expenses, receipts and disbursements of their said trust and preserve proper vouchers for all payments made by them on account thereof.

It is further ordered, that the said receivers shall forthwith file in the office of the clerk of this court the consent of the surety on the bonds of the said receivers already given in the suit of the Pennsylvania Steel Company and the Degmon Contracting Company against New York City Railway Company and Metropolitan Street Railway Company, that the said bonds shall apply and the liability of the said surety shall continue and exist also in this suit and in respect of any and all acts and transactions of the said receivers whether under their original appointment or under their appointment in this suit, or, in lieu thereof, that the said receivers file in this suit their joint and several bond in the sum of two hundred and fifty thousand dollars, conditioned that they will well and truly perform the duties of their office and duly account for all moneys or property 44 which may come into their hands and abide by and perform all things which they shall be directed to do, with sufficient sureties to be approved of by a judge of this court.

And it is further ordered, that each and every of the officers, directors, agents and employees of said defendant, Metropolitan Street

Railway Company, be, and they are hereby, required and commanded forthwith upon demand of the said receivers or their duly authorized agent, to turn over and deliver to said receivers or their duly constituted representative, any of the said property in his or their hands or under his or their control, provided, however, that the complainant shall be entitled to retain possession of any stocks, bonds or securities pledged under said mortgage.

And said defendant, Metropolitan Street Railway Company, its officers, directors, agents and employees and all other persons claiming to act by, through or under said defendant, and all other persons whomsoever, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the receivers are hereby appointed, or interfering in any way to prevent the discharge of their duties.

And it is further ordered, adjudged and decreed, that the suit of Morton Trust Company, complainant, against Metropolitan Street Railway Company, New York City Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company, the Pennsylvania Steel Company and the Degnon Contracting Company, defendants, in which suit the bill of complaint was filed in this court on

October 9, 1907, be and the same hereby is consolidated with  
45 this suit and all orders and proceedings had therein are hereby made the orders and proceedings in this cause, the consolidated cause to proceed under the title of this cause, as above recited and set forth, and any party in interest may apply for further direction.

Dated, New York, November 19th, 1907.

E. HENRY LACOMBE,

*U. S. C. J.*

*Exhibit F.*

Circuit Court of the United States, for the Southern District of New York.

GUARANTY TRUST COMPANY OF NEW YORK, COM-  
plainant,  
*against*

METROPOLITAN STREET RAILWAY COMPANY, ADRIAN H.  
Joline and Douglas Robinson, as receivers of Metro-  
politan Street Railway Company, New York City  
Railway Company, Adrian H. Joline and Douglas  
Robinson, as receivers of New York City Railway  
Company, Morton Trust Company, the Pennsylvania  
Steel Company, and the Degnon Contracting Com-  
pany, defendants.

} In equity.

46 This cause came on this day to be heard on motion of the complainant for the appointment of receivers, as prayed in the bill of complaint.

On said bill of complaint, after hearing Julien T. Davies, Esq., for complainant, and J. Parker Kirlin, Esq., for defendant, Metropolitan Street Railway Company, and Arthur H. Masten, Esq., for defendants, Joline and Robinson, and notice of this application having been duly given to New York City Railway Company, Morton Trust Company, the Pennsylvania Steel Company, and the Degnon Contracting Company, it is, on motion of Messrs. Davies, Stone & Auerbach, solicitors for complainant,

Ordered, adjudged, and decreed, that Adrian H. Joline and Douglas Robinson be, and they hereby are, appointed under the bill of complaint in this cause receivers of all the railroads, properties, and premises mortgaged and pledged under the mortgage dated February 1, 1897, made by the defendant, Metropolitan Street Railway Company, to the complainant, Guaranty Trust Company of New York, as trustee, described in the bill of complaint in this cause, and of all the tolls, earnings, income, rents, issues, and profits of said railroad, property, and premises; that said receivers be, and they hereby are, authorized to run, manage, and operate the said railroads and properties, to collect the rents, income tolls, issues, and profits of such railroads and property, to exercise the authority and franchises of said defendant and discharge its public duties, acting in all things subject to the supervision of this court.

And it is further ordered, adjudged, and decreed, that said receivers be, and they hereby are, authorized in their discretion to employ and discharge and fix the compensation of all attorneys, managers, superintendents, agents, and employees, and to make such payments  
47 and disbursements as may be needful and proper in so doing; that the said receivers be, and they hereby are, fully authorized and empowered to institute and prosecute in their own names or in the name of said Metropolitan Street Railway Company all such suits as may be necessary, in their judgment, for the proper protection of the trust estate and the discharge of their trust, and likewise to defend all actions instituted against them as receivers, and also to appear in and continue or defend any suits now pending in any court to which said defendant, Metropolitan Street Railway Company, is a party, the continuation or defense of which will, in the judgment of said receivers, be necessary for the proper protection of the trust estate and of the interests and rights of creditors connected therewith.

And it is further ordered, adjudged, and decreed, that said receivers be, and they are hereby, authorized in their discretion, from time to time, out of the funds coming into their hands, to pay the expenses of operating the said properties and executing their trusts, and to make such repairs to said properties and premises as in their judgment may be necessary in order safely to conduct said operation under this order.

That said receivers are hereby required to keep proper books of account, wherein shall be separately stated the earnings and income

of the lines of railway and other properties charged in the bill of complaint to be subject to the lien of complainant's mortgage, together with the expenses and disbursements of the receivers with respect to said lines of railway and other properties, and said receivers are hereby required to preserve proper vouchers for all payments made by them in the execution of their said trust.

48     The receivers shall enter or cause to be entered any and all disbursements which do not require apportionment or which can be apportioned by recognized rules of railroad accounting, and they shall apportion and enter all other items, as soon as may be after receiving a direction in writing as to the method of such apportionment, signed by the Metropolitan Street Railway Company and by the trustees acting under the two mortgages of said company, dated respectively, February 1, 1897, and March 21, 1902, and referred to in the bill of complaint herein. All items requiring apportionment, as to which such direction is not given, shall be entered in a separate account or accounts and reported to the court as part of the bimonthly accounting of said receivers, and the special master charged with the examination of said bimonthly accounts is hereby authorized and directed to classify and apportion such unapportioned items and to correct and complete the separation of the earnings and income of said property mortgaged to the complainant, from the earnings and income of the remainder of the property operated by the receivers and to report his conclusions thereon to the court. The ruling of the special master in stating such accounts shall be subject to review by the court upon exceptions filed by any party in interest.

It is further ordered, that the said receivers shall forthwith file in the office of the clerk of this court the consent of the surety on the bonds of the said receivers already given in the suit of the Pennsylvania Steel Company and the Degnon Contracting Company against New York City Railway Company and Metropolitan Street Railway Company and in the suit of the Morton Trust Company against the Metropolitan Street Railway Company and others, that the said bonds shall apply and the liability of the said surety shall continue and exist also in this suit and in respect of any and all acts

49     and transactions of the said receivers, whether under their original appointment or under their appointment in this suit; or in lieu thereof, that the said receivers shall file in this suit their joint and several bond in the sum of two hundred and fifty thousand dollars (\$250,000), conditioned that they will well and truly perform the duties of their office and duly account for all moneys or property which may come into their hands and abide by and perform all things which they shall be directed to do with sufficient sureties to be approved by a judge of this court.

And it is further ordered, that each and every of the officers, directors, agents, and employees of said defendant, Metropolitan Street Railway Company, be, and they are hereby, required and com-

manded forthwith, upon demand of the said receivers, or their duly authorized agent, to turn over and deliver to said receivers, or their duly constituted representatives, any of the said property in his or their hands or under their control; provided, however, that the complainant shall be entitled to retain possession of any stocks or securities pledged under said mortgage.

And said defendant, Metropolitan Street Railway Company, its officers, directors, agents and employees, and all other persons claiming to act by, through, or under said defendant, and all other persons whatsoever, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the receivers are hereby appointed, or interfering in any way to prevent the discharge of their duties, and any party in interest may apply for further direction.

Dated, New York, March 17, 1908.

E. HENRY LACOMBE,  
*United States Circuit Judge.*

50

*Exhibit G.*

United States internal revenue.

Return of annual net income.

(Section 38, act of Congress approved August 5, 1909.)

Transportation corporations.

*Return of net income received during the year ending December 31, 1909, by the Metropolitan Street Railway Company, a corporation, the principal place of business of which is located at New York, in the State of New York.*

1. Total amount of paid-up stock outstanding at close of year... \$52,000,000.00
2. Total amount of bonded or other indebtedness outstanding at close of year..... \$-----
3. Gross income (see Note A)..... \$-----

Deductions.

4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)..... \$-----
5. (a) Total amount of losses sustained January 1 to December 31..... \$-----
- (b) Total amount of depreciation January 1 to December 31..... \$-----
- Total (see Note B)..... \$-----
- 51 6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)..... \$-----



7. (a) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof.....\$-----  
 (b) Foreign taxes paid.....\$-----  
 Total (see Note B).....\$-----
8. Amount received by way of dividends upon stock of other corporations, joint stock companies, associations, and insurance companies subject to this tax.....\$-----  
 Total deductions.....\$-----
9. Net income.....\$-----
10. Specific deductions from net income allowed by law.....\$5,000.00
11. Amount on which tax at one per centum is to be calculated for assessment.....\$-----

During the year 1909 the property of this company was in the hands of receivers appointed by a court of competent jurisdiction, who were in actual charge of its operations; the officers of the company are therefore unable to make this report.

52 STATE OF NEW YORK, *County of New York, to wit:*

Charles E. Warren, vice president, and D. C. Moorehead, treasurer, of the above-named corporation, whose return of annual net income is set forth above, being severally duly sworn, each for himself, deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth is the full amount of gross income, without any deduction whatsoever, received from all sources by the said corporation during the year stated, and that the net income therein set forth is the full amount on which tax is proper to be assessed.

CHARLES E. WARREN,  
*Vice President.*

D. C. MOOREHEAD,  
*Treasurer.*

Sworn and subscribed to before me this 30th day of April, 1911.


PETER C. NICKEL,

[SEAL.]

*Notary Public, No. 17, N. Y. County.*

NOTE A.—Gross income shall consist of the gross revenue derived from the operation and management of the business and property of the corporation making the return, together with all amounts of income (including dividends received on stock of other corporations, joint stock companies, and associations subject to this tax) derived from all sources as shown by the entries on its books from January 1 to December 31, of the year for which return is made.

53 NOTE B.—The deductions authorized shall include all expense items under the various heads acknowledged as liabilities by the corporation making the return and entered as such on its books from January 1 to December 31 of the year for which return is made.

 **NOTE C.**—This form, properly filled out and executed, must be in the hands of the collector of internal revenue for the district in which is located the principal business office of the corporation making the return, on or before March 1.

*Exhibit H.*

United States Internal Revenue.

Return of annual net income.

(Section 38, act of Congress approved August 5, 1909.)

Transportation corporations.

*Return of net income received during the year ending December 31, 1910, by the Metropolitan Street Railway Company, a corporation, the principal place of business of which is located at No. 621 Broadway, city or town of New York, in the State of New York.*

1. Total amount of paid-up capital stock outstanding at close of year	\$52,000,000.00
54 2. Total amount of bonded or other indebtedness outstanding at close of year	\$
3. Gross income (see Note A)	\$

DEDUCTIONS.

4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation exclusive of interest payments (see Note B)	\$
5. (a) Total amount of losses sustained January 1 to December 31, not compensated by insurance or otherwise	\$
(b) Total amount of depreciation January 1 to December 31	\$
6. Total amount of interest paid January 1 to December 31 on an amount of bonded and other indebtedness not exceeding the amount of paid-up capital stock outstanding at the close of the year	\$
55 7. (a) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof	\$
(b) Foreign taxes paid	\$
8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax	\$
Total deductions (see Note B)	
9. Net income	\$
10. Specific deduction from net income allowed by law	\$5,000.00
11. Amount on which tax at one per centum is to be calculated for assessment	\$

During the year 1910 the property of this company was in the hands of receivers appointed by a court of competent jurisdiction,

who were in actual charge of its operations; the officers of the company are therefore unable to make this report.

56 STATE OF NEW YORK,  
*County of New York, to wit:*

Charles E. Warren, vice president, and D. C. Moorehead, treasurer, of the above-named corporation, whose return of annual net income is set forth above, being severally duly sworn, each for himself, deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth is the full amount of gross income, without any deduction whatsoever, received from all sources by the said corporation during the year stated, and that the net income therein set forth is the full amount by which to measure the tax at one per centum for assessment.

CHARLES E. WARREN,  
*Vice President.*

D. C. MOOREHEAD,  
*Treasurer.*

Sworn and subscribed to before me this 23d day of February, 1911.

[SEAL.] PETER C. NICKEL,  
*Notary Public, No. 17, N. Y. County.*

NOTE A.—Gross income shall consist of the gross revenue derived from the operation and management of the business and property of the corporation making the return, together with all amounts of income (including dividends received on stock of other corporations, joint stock companies, and associations subject to this tax) derived from all sources as shown by the entries on its books from January 1 to December 31, of the year for which return is made.

57 NOTE B.—The deductions authorized shall include all expense items under the various heads acknowledged as liabilities by the corporation making the return and entered on its books from January 1 to December 31. Amounts of income expended in paying dividends on stock, preferred or common, or in making permanent improvements, in betterments, etc., or in any way transferred to capital account, are not proper deductions in ascertaining annual net income. Interest paid on mortgage indebtedness on real estate acquired by a corporation may be deducted in item 4, if the mortgage remains a lien on the property and the debt is not assumed by the corporation. The amount so paid and included in item 4 should, however, be separately stated under item 4.

NOTE C.—This form, properly filled out and executed, must be in the hands of the collector of internal revenue for the district in which is located the principal business office of the corporation making the return on or before March 1.

58

*Answer.*

Circuit Court of the United States, for the Southern District of  
New York.

THE PENNSYLVANIA STEEL COMPANY ET AL., complainants, <i>against</i>	} Equity No. 2-9.
NEW YORK CITY RAILWAY COMPANY, DE- fendant.	

THE FARMERS' LOAN AND TRUST COMPANY, AS trustee, successor of Morton Trust Company, as trustee, complainant, <i>against</i>	} Equity No. 2-33.
METROPOLITAN STREET RAILWAY COMPANY ET al., defendants.	

GUARANTY TRUST COMPANY OF NEW YORK, complainant, <i>against</i>	} Equity No. 2-149.
METROPOLITAN STREET RAILWAY COMPANY ET al., defendants.	

59 THE FARMERS' LOAN AND TRUST COMPANY, as trustee, successor of Morton Trust Company, as trustee, complainant, <i>against</i>	} Equity No. 3-37.
METROPOLITAN STREET RAILWAY COMPANY et al., defendants.	

In the matter of the application of the United States of America for an order directing Adrian H. Joline and Douglas Robinson, appointed receivers in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910 for the Metropolitan Street Railway Company of its net income to the collector of internal revenue for the second district of New York, in which district the said corporation had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112).

60 *To the honorable the judges of the United States Circuit Court for the Southern District of New York:*

The answer of Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company, appearing by Masten & Nichols, their solicitors, respectfully shows to this honorable court as follows:

First. The respondents admit the allegations contained in paragraph first of the petition; but for a more accurate statement of the

nature and powers of the Metropolitan Street Railway Company, respondents refer to the consolidation agreement, dated November 7, 1895, under which said corporation was organized, which agreement is hereto annexed marked "Schedule 1" and made a part hereof. Respondents allege that the amount of the authorized capital stock of the Metropolitan Street Railway Company at the present time is \$52,000,000 par value.

Second. The respondents admit the allegations contained in paragraph second of the petition; but in order that the purpose and effect of the order entered September 24, 1907, Exhibit A to the petition, may more clearly appear, respondents ask leave to refer to the petition filed by the Pennsylvania Steel Company and the Degnon Contracting Company on September 24, 1907, and the answer of the New York City Railway Company filed on the same day, which papers are now on file in the office of the clerk of this court, and are made a part of this answer as "Schedule 2" and "Schedule 3," respectively.

Third. The respondents admit the allegations contained in paragraph third of the petition; but in order that the purpose and effect of the order filed October 1, 1907, Exhibit B to the petition, may more clearly appear, respondents ask leave to refer to the petition of the Metropolitan Street Railway Company, filed October 1, 1907, which petition is hereby made a part of this answer as "Schedule 4."

Fourth. The respondents admit the allegations contained in paragraph fourth of the petition.

Fifth. The respondents admit the allegations contained in paragraph fifth of the petition; but in order that the purpose and effect of the said order dated October 9, 1907, Exhibit D to the petition, may more clearly appear, respondents ask leave to refer to the bill of complaint filed by the Morton Trust Company, as trustee, October 9, 1907, now on file in the office of the clerk of this court, which bill of complaint is hereby made a part of this answer as "Schedule 5."

Sixth. The respondents admit the allegations contained in paragraph sixth of the petition; but in order that the purpose and effect of the order, dated November 9, 1907, may more clearly appear, respondents ask leave to refer to the entire order, which is on file in the office of the clerk of this court and is hereby made a part hereof as "Schedule 6."

Seventh. The respondents admit the allegations contained in paragraph seventh of the petition; but in order that the purpose and effect of the said order of November 19, 1907, may more clearly appear, respondents ask leave to refer to the bill of complaint filed by the Morton Trust Company, as trustee, November 9, 1907, now on file in the office of the clerk of this court, which bill of complaint is hereby made a part hereof as "Schedule 7."

62 Eighth. The respondents admit the allegations contained in paragraph eighth of the petition; but in order that the purpose and effect of the order dated March 17, 1908, Exhibit F to

the petition, may more clearly appear, respondents ask leave to refer to the bill of complaint filed by the Guaranty Trust Company of New York, as trustee, February 26, 1908, now on file in the office of the clerk of this court, which said bill of complaint is hereby made a part hereof as "Schedule 8."

Ninth. The respondents admit the allegations contained in paragraph ninth of the petition: but in order that the purpose and effect of the order entered July 24, 1908, may more clearly appear, respondents ask leave to refer to the entire order, which is on file in the office of the clerk of this court and is hereby made a part hereof as "Schedule 9."

Tenth. The respondents admit the allegations contained in paragraph tenth of the petition.

Eleventh. The respondents admit the allegations contained in paragraph eleventh of the petition, to the effect that the respondents, immediately upon their appointment, took possession of all the assets and property of the said Metropolitan Street Railway Company, of every kind and nature whatsoever, and have ever since remained in possession thereof, and have acted and continued to act during the years 1909 and 1910, and ever since, pursuant to the terms of each of the said orders appointing them such receivers since the respective dates of entry thereof: but respondents are unable to say whether, during the years 1909 and 1910, and ever since, the business of the said Metropolitan Street Railway Company has been done, performed, and carried on by the respondents, their agents, employees, servants, etc., and by them alone, and therefore deny said allegation.

Twelfth. The respondents admit the allegations contained in paragraph twelfth of the petition.

Thirteenth. The respondents deny the allegations contained in paragraph thirteenth of the petition, to the effect that by virtue of their appointment in each of the actions set out in the petition the respondents took the place of the directors and officers of the Metropolitan Street Railway Company during the pendency of said actions to the same effect and with the same liabilities, obligations, and duties as were and are imposed by law upon such directors and officers of the said Metropolitan Street Railway Company, and more particularly by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112): and said respondents allege that they took possession of the said railroads and properties of the Metropolitan Street Railway Company as officers of this honorable court, and as such officers of this court they continued to hold possession of and to operate the railroads and properties of the Metropolitan Street Railway Company during the years 1909 and 1910, and now hold possession thereof.

Fourteenth. The respondents admit the allegations contained in paragraph fourteenth of the petition, to the effect that the respondents have failed to file a true and accurate return, or any return, of said Metropolitan Street Railway Company, as required by the provisions

of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112), for the years 1909 and 1910, and still refuse so to do; but respondents allege that their failure to file said return was in pursuance of the instructions of this honorable court, to which

64 respondents duly applied for instructions in the premises.

Fifteenth. The respondents admit the allegations contained in paragraphs fifteenth and sixteenth of the petition.

Sixteenth. The respondents further show to this honorable court that, on or about the 18th day of March, 1909, a decree of foreclosure and sale was duly entered in the third of the above-entitled actions; that an appeal was duly taken from said decree of foreclosure and sale to the Circuit Court of Appeals of the United States for the Second Circuit, where said decree of foreclosure and sale was modified and affirmed, and on April 6, 1910, a decree of foreclosure and sale was entered on the mandate of the Circuit Court of Appeals and is now on file in the office of the clerk of this court; and respondents ask leave to make said decree of foreclosure and sale entered April 6, 1910, a part of this answer, as "Schedule 10."

Seventeenth. The respondents show that a decree of foreclosure and sale was entered in the fourth of the above-entitled actions on the 31st day of May, 1910, and that on the 6th day of April, 1910, a supplemental decree of foreclosure and sale was also entered in said suit; that an appeal was duly taken from the said supplemental decree to the Circuit Court of Appeals of the United States for the Second Circuit, and said appeal is now pending in said court undetermined. Respondents ask leave to make said decree and supplemental decree a part of this answer as "Schedule 11" and "Schedule 12," respectively.

65 Eighteenth. The respondents further show that no sale has yet been made of the properties covered by the above-mentioned decrees of foreclosure and sale, but that the sale of said properties has been postponed from time to time upon application of the committee of bondholders engaged in the reorganization of the said Metropolitan Street Railway Company.

Wherefore, respondents pray that they may be instructed by this honorable court in the premises and that they may have such other and further relief in the premises as may be just.

New York, November 24, 1911.

ADRIAN H. JOLINE,  
DOUGLAS ROBINSON,

*As Receivers of Metropolitan Street Railway Company.*

ARTHUR H. MASTEN,  
*Of Counsel.*

STATE OF NEW YORK, *County of New York, Southern District of New York, ss.:*

Adrian H. Joline, being duly sworn, says that he is one of the receivers of the Metropolitan Street Railway Company, and, as such, one of the respondents above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true



of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

ADRIAN H. JOLINE.

Sworn to before me this 24th day of November, 1911.

[NOTARIAL SEAL.]

JOHN J. WATERS.

*Notary Public, No. 174, New York County.*

66

### Schedule 1.

This joint agreement made this seventh day of November, 1895, between the directors of the Metropolitan Street Railway Company (hereinafter called the Metropolitan Company), party of the first part, and the directors of the Columbus and Ninth Avenue Railroad Company (hereinafter called the Columbus Company), party of the second part, under the corporate seals of the said companies witnesseth:

That the Metropolitan Street Railway Company, said party of the first part, is a railroad company formed on or about the 28th day of May, 1894, as will appear by the certificate of consolidation, dated May 18th, 1894, by and between the Metropolitan Street Railway Company, and the Metropolitan Crosstown Railway Company, and the Lexington Avenue and Pavyonia Ferry Railroad Company, thereby consolidated into and forming the said Metropolitan Street Railway Company, from and after the said 28th day of May, 1894, the date of the filing of such agreement of consolidation in the office of the Secretary of the State of New York, which consolidated company operates a railroad wholly within the said city and county of New York, and the authorized capital stock thereof is \$13,500,000, divided into 135,000 shares of \$100 each, all of which have been actually issued and are now outstanding.

That the Columbus and Ninth Avenue Railroad Company, said party of the second part, is a railroad company organized on or about the 22d day of December, 1892, as will appear by the certificate filed on or about that day in the office of the Secretary of the State of New York, formed under the act, chapter 565 of the Laws of 1890 of the State of New York, entitled the "Railroad law," and  
67 the acts amendatory thereof and supplementary thereto, and operates a railroad wholly within the said city and county of New York, and the capital stock thereof is \$3,000,000, divided into 30,000 shares of \$100 each, all of which have been actually issued and are now outstanding.

That the railroads of the said two corporations have been actually constructed and are now in operation and form a continuous or connected line of street surface railroad with each other in the city of New York.

That in consideration of the mutual covenants and agreements herein contained, the said parties hereto do hereby agree to, and do, as provided by the "Railroad law," hereby merge and consolidate the capital stock, franchises, and property of the two parties hereto of the

first and second parts respectively, each with the other, and all together, in such manner as to form one corporation of the name hereinafter set forth.

And they do hereby further covenant and agree upon, and prescribe the terms and conditions of, the consolidation of such corporations and railroads, and the mode of carrying the same into effect, which they mutually covenant and agree to observe as follows, to wit:

That the said new corporation accepts and receives the property of the said existing corporations, subject to all the charges thereon and the duties and liabilities incurred by each of said corporations, respectively, and more specifically subject to the following existing obligations secured by mortgage upon the property of one or the other of the consolidating companies, to wit:

Houston, West Street and Pavonia Ferry Railroad Company first mortgage	\$700,000
South Ferry Railway Company first mortgage	350,000
68 Broadway Surface Railroad Company first mortgage	1,500,000
Broadway Surface Railroad Company second mortgage	1,000,000
Metropolitan Crosstown Railway Company first mortgage	600,000
Metropolitan Crosstown Railway Company second mortgage	300,000
Lexington Avenue and Pavonia Ferry Railroad Company first mortgage	5,000,000
Columbus and Ninth Avenue Railroad Company first mortgage, dated August 24th, 1893, and recorded in the office of the register of deeds of the city and county of New York on the 26th day of August, 1893, at 9 o'clock and 40 minutes a. m.	3,000,000
Making a total mortgage indebtedness of	12,250,000
besides interest thereon.	

And the said new corporation from time to time may at its option issue its bonds for the purpose of paying or retiring any of the said mortgage obligations heretofore issued by either of the said companies or corporations so consolidated, or for any other purpose, as now or hereafter authorized by law.

That the said new corporation shall continue for the period of one thousand years.

That the name of the new corporation shall be "Metropolitan Street Railway Company."

That the number of directors of the new corporation shall be nine.

That the names and places of residence of the directors and  
69 other officers thereof, who shall be the first directors and officers of the said new corporation, are as follows:

Directors.	Residence.
Herbert H. Vreeland	New York, N. Y.
Daniel B. Hasbrouck	Brooklyn, N. Y.
Charles E. Warren	Brooklyn, N. Y.
Hans S. Beattie	New York, N. Y.
Henry A. Robinson	Yonkers, N. Y.
George B. M. Harvey	New York, N. Y.
J. Wadsworth Ritchie	New York, N. Y.
Ralph L. Anderton, jr.	New York, N. Y.
Frederick S. Pearson	New York, N. Y.

Officers.	Residence.
President, Herbert H. Vreeland.....	New York, N. Y.
Vice president, Daniel B. Hasbrouck.....	Brooklyn, N. Y.
Second vice president, Henry A. Robinson.....	Yonkers, N. Y.
Treasurer, Hans S. Beattie.....	New York, N. Y.
Secretary, Charles E. Warren.....	Brooklyn, N. Y.

That the number of shares of the capital stock of the new corporation shall be one hundred and sixty-five thousand (165,000) shares, and that the amount or par value of each share shall be \$100, making a total capital stock of the new corporation of the par value of \$16,500,000.00, being the exact equivalent of the capital stock of the two corporations hereby consolidated at the par value thereof.

That the manner of converting the capital stock of each of the corporations, parties hereto, into that of the new corporation shall be as follows, to wit:

By issuing the stock of the new corporation at the par value thereof, share for share, in exchange for the capital stock of each of the corporations hereby consolidated at the par value thereof.

That the said new corporation shall have its principal place of business in the city and county and State of New York.

That the directors and officers of the said new corporation shall be chosen by ballot, and the election shall be held on the first Monday of December, 1895, and annually thereafter.

In testimony whereof this agreement has been executed in triplicate, in behalf of the said Metropolitan Street Railway Company, under its corporate seal, by the vice president and secretary of said company, who have been duly designated in that behalf by the board of directors of said company, and in behalf of the said Columbus and Ninth Avenue Railroad Company, under its corporate seal, by the president and secretary of said company, who have been duly designated in that behalf by the board of directors of said company, the day and year first above written.

METROPOLITAN STREET RAILWAY COMPANY.  
By DANIEL B. HASBROUCK, *Vice President*,

[CORPORATE SEAL.]

Attest:

CHARLES E. WARREN,  
*Secretary*.

COLUMBUS AND NINTH AVE. R. R. COMPANY.  
By ANTHONY N. BRADY, *President*,

[CORPORATE SEAL.]

Attest:

R. L. ANDERTON, JR.,  
*Secretary*.

In the Circuit Court of the United States for the Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY AND THE DEGNON Contracting Company, complainants, <i>against</i> NEW YORK CITY RAILWAY COMPANY, DEFENDANT.	}	In equity.
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*To the Judges of the Circuit Court of the United States for the Southern District of New York:*

Your orators, the Pennsylvania Steel Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, and a citizen of said State, and the Degnon Contracting Company, a corporation duly organized and existing under the laws of the State of New Jersey, and a citizen of said State, bring this their bill of complaint on their behalf and on behalf of all other creditors of New York City Railway Company, defendant, who may hereafter join in the prosecution of this suit against the New York City Railway Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, resident in the Southern District of New York, and thereupon your orator alleges as follows:

72 First. That your orator, the Pennsylvania Steel Company, is a corporation duly organized and existing under the laws of the State of Pennsylvania, and a citizen and resident of said State, and your orator, the Degnon Contracting Company, is a corporation duly organized and existing under the laws of the State of New Jersey and a citizen and resident of said State.

Second. On information and belief that the defendant was at all the times hereinafter mentioned and is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, having its principal office in the city of New York, and a resident of the Southern District of New York.

Third. On information and belief that the defendant, New York City Railway Company, was organized under the laws of the State of New York on or about the 25th day of November, 1901; that the defendant owns and operates certain lines of street railway in the Borough of the Bronx, in the city of New York, and also is in possession of and is operating, as hereinafter set forth, the system of street railways of the Metropolitan Street Railway Company in said city; that said defendant, through ownership of capital stock, also controls other companies owning other lines of street railway in said city; that the total mileage of the system of the defendant, including the mileage of leased lines and lines of companies controlled through ownership of stock, is upwards of five hundred miles (500) miles, and said system of the defendant embraces practically the

entire surface traction system in the Borough of Manhattan and in the Borough of the Bronx, in said city of New York; that appurtenant to the railroads of said defendant are various rights, easements, and privileges growing out of the same and connected therewith, and the defendant has other franchises and easements and holds valuable contracts, including contracts for mail and express service.

Fourth. On information and belief, that the defendant is in possession of and operates the main lines of its system under a lease bearing date the 21st day of March, 1902, made to it by said Metropolitan Street Railway Company, by which said lease said lessor leased to the defendant the entire system of the lessor then owned or thereafter to be acquired by said lessor during the term of said lease, for the term of nine hundred and ninety-nine years from the date of said lease; that the system of said lessor so leased to the defendant embraced not only the lines owned by said Metropolitan Street Railway Company but also all lines leased to said lessor, embracing among others the lines of the Third Avenue Railroad Company, which, including as well all lines at the time owned as all subsequent additions, said Third Avenue Railroad Company, by indenture of lease, bearing date the 13th day of April, 1900, had demised to said Metropolitan Street Railway Company for the term of nine hundred and ninety-nine years from the date of said indenture of lease; that in addition to said lines of said Third Avenue Railroad Company, said lease made by the Metropolitan Street Railway Company to the defendant embraces the lines of the following companies theretofore leased to said Metropolitan Street Railway Company or its predecessors, by various indentures of lease:

Broadway and Seventh Avenue Railroad Company,

Sixth Avenue Railroad Company,

Ninth Avenue Railroad Company,

Twenty-third Street Railway Company,

74 Bleecker Street & Fulton Ferry Railroad Company,

Central Park, North and East River Railroad Company,

Forty-second Street and Grand Street Ferry Railroad Company,

Eighth Avenue Railroad Company,

New York and Harlem Railroad Company (City Line),

Second Avenue Railroad Company,

Central Crosstown Railroad Company,

Christopher and Tenth Street Railroad Company,

and that by said lease, made by said Metropolitan Street Railway Company to the defendant, it is among other things provided that in case the defendant, said lessee, shall fail to pay the rent provided for in said lease as the same should accrue, and any such default should continue for the period of twelve months after written demand, and notice, the leasehold estate thereby created might at the option of said lessor be terminated.

Fifth. On information and belief, that said defendant has an authorized capital stock of twenty million dollars, of which there has

been issued and is outstanding stock to the amount of thirteen million dollars; that the lines of railway owned by said defendant are not subject to mortgage, but the lines embraced in its system are subject to the following mortgage indebtedness, which is now outstanding, the refunding mortgage of said Metropolitan Street Railway Company being, and being expressed to be, subject to said lease of February 14, 1902, made by said last-named railway company to the defendant:

	Amount outstanding.
75 Metropolitan Street Railway Company, general and collateral trust mortgage	\$12,500,000
Metropolitan Crosstown Railway Company, first mortgage	600,000
Lexington Avenue and Pavonia Ferry Railroad Company, first mortgage	5,000,000
Columbus and Ninth Avenue Railroad Company, first mortgage	3,000,000
South Ferry Railroad Company, first mortgage	350,000
Broadway Surface Railroad Company, first mortgage	1,500,000
Metropolitan Street Railway Company, refunding mortgage	16,604,000
Fulton Street Railroad Company, first mortgage	500,000
Thirty-fourth Street Crosstown Railway Co., first mortgage	1,000,000
Twenty-eighth and Twenty-ninth Streets Crosstown Railroad Company, first mortgage	1,500,000
Union Railway Company of New York, first mortgage	2,000,000
Yonkers Railroad Company, first mortgage	1,000,000
Westchester Electric Railroad Co., first mortgage	500,000
Tarrytown, White Plains and Mamaroneck Railway Company, first mortgage	300,000
Southern Boulevard Railroad Company	250,000
Dry Dock, East Broadway and Battery Railroad Company, general mortgage	950,000
76 Dry Dock, East Broadway and Battery Railroad Company, certificates of indebtedness	1,100,000
Forty-second St., Manhattanville & St. N. Av. Ry. Co., first mortgage	1,200,000
Forty-second St., Manhattanville & St. N. Av. Ry. Co., second mortgage income	140,000
Broadway & 7th Ave. Railroad Co., second mortgage	500,000
Broadway & 7th Ave. Railroad Co., first consolidated mortgage	7,650,000
Central Crosstown Railroad Co., first mortgage	250,000
Central Crosstown Railroad Co., first consolidated mortgage (deposited with Morton Trust Co., as collateral security for the three-year notes of said railroad company, to the face amount of \$2,250,000)	2,490,000
The Third Avenue Railroad Company, first mortgage	5,000,000
The Third Avenue Railroad Company, first consolidated mortgage	37,560,000
Bleecker St. and Fulton Ferry Railroad Co., first mortgage	700,000
Second Ave. Railroad Company, first mortgage	1,280,000
Second Avenue Railroad Company, debenture bonds	80,000
Second Avenue Railroad Company, first consolidated mortgage	5,631,000
Christopher and Tenth Street Railroad Co., first mortgage	210,000

That your orators are informed and believe that failure to meet the interest on such mortgage indebtedness, as such interest matures, will operate also as a default under the mortgage securing the indebtedness, the interest on which shall so become in default, and render such mortgage enforceable.

Sixth. On information and belief that the defendant since entering into possession as aforesaid under said lease from said Metropolitan Street Railway Company, has operated all the lines owned and

leased by it as parts of a single system, constituting routes over different lines or parts of lines, connecting separated lines over parts of intermediate leased lines or lines of controlled companies, interchanging equipment among the various lines and furnishing equipment as might be required to meet from time to time the varying requirements of particular lines, supplying power and using power houses, car barns, and stations as seemed best for the effective and economical operation of the system as a whole, and also establishing a system of transfers between various lines and routes; that the defendant owns equipment to a substantial amount, which has been used over the system as varying requirements of operation made necessary without assignment to any particular line or lines; and your orators are informed and believe that many of the leased lines in defendant's system are without adequate equipment of their own; and your orators are further informed and believe that in many cases the motive power employed on leased lines or lines of controlled companies has been changed to electricity without supplying said lines with independent power houses or other independent sources of supply of power, leaving such lines dependent for power on other lines of the system.

78 Seventh. Your orator, the Pennsylvania Steel Company, alleges positively, and your orator, the Degnon Contracting Company, on information and belief that the defendant is indebted to your orator, the Pennsylvania Steel Company, in the sum of thirty-six thousand eight hundred and thirty-one and 38/100 dollars (\$36,831.38) for rails and track material furnished and supplied by your orator, the Pennsylvania Steel Company, to the defendant, at the request of the defendant, and for which the defendant agreed to pay your orator, the Pennsylvania Steel Company, said sum of thirty-six thousand eight hundred and thirty-one and 38/100 dollars (\$36,831.38), and payment of said sum has been duly demanded by your orator, the Pennsylvania Steel Company, from the defendant, and payment thereof refused, and the same is now wholly due and unpaid; that said rails and track material were so supplied to the defendant for the purposes of the operation of its street railway system and to enable the defendant to comply with and fulfill the duty towards the public which the defendant, as well as the respective lessors of the defendant, owed to the public, and to discharge its and their obligations, respectively, under the franchises for the operation of their respective lines, and were used for the purposes aforesaid; that your orator, the Degnon Contracting Company, alleges positively, and your orator, the Pennsylvania Steel Company, on information and belief, that the defendant is indebted to your orator, the Degnon Contracting Company, in the sum of eleven thousand one hundred and seventy-three dollars and twenty-seven cents (\$11,173.27) for work and labor done for the defendant at the request of the defendant, for which the defendant agreed to pay your orator, the Degnon Contracting Company, said sum of \$11,173.27, and that payment of said sum has been duly

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demanding by your said orator from the defendant and payment thereof refused, and the same is now wholly due and unpaid.

Eighth. That your orators are informed and believe that since entering into possession of the premises demised under said lease made by said Metropolitan Street Railway Company the defendant has expended large sums aggregating more than twenty million dollars in making extensions, improvements, and additions and other capital expenditures to and upon lines of its system, including its leased lines and lines of controlled companies, and has so expended large amounts in the electrification of various lines theretofore operated by horses, and that said expenditure has greatly benefited such lines of railroad and enhanced the value of said leased properties and properties of controlled companies, but that the expenditures required for that purpose have exceeded the resources of the defendant; that the defendant has recently entered into contracts for electrification, which are now in course of performance; that the ultimate liability of the defendant under such contracts is upwards of four million dollars; that the defendant is and will be unable to meet such liability, and that, notwithstanding large amounts have been expended in the purchase of materials and otherwise in connection with such electrification, such work must be suspended, thereby causing heavy loss to the defendant and subjecting the defendant to heavy liabilities; that the defendant has been required and will be required to make large expenditures for the maintenance and repair of its system, and among other things has entered into contracts for new equipment to replace equipment destroyed, or  
80 otherwise requisite for the operation of its system; that said equipment will shortly be deliverable and that the defendant will be unable to pay therefor, although immediately necessary for the operation of its lines; that in the course of the operation of its lines numerous accidents have occurred, in respect of which suits have been brought and are now pending, and that said suits to the number of several thousand are now upon the calendars of the courts awaiting trial, and that the defendant will be without means to meet judgment recovered in said suits.

Ninth. That your orators are informed by the officers of the defendant and believe that the defendant has outstanding floating indebtedness for materials, equipment, taxes, and supplies furnished to the amount of upwards of two million dollars; that said floating indebtedness is now overdue; that the defendant is unable to pay the same, and that the holders thereof are pressing for payment thereof; that the defendant also has outstanding obligations to the amount of several million dollars, the payment of which is secured by obligations of various companies controlled by the defendant or owning leased lines embraced in the defendant's system; that said obligations are payable on demand, and that the defendant is without means to pay such obligations, or, under existing financial conditions, to effect new loans against such collateral, and is without other collateral available for such purpose. Your orators are in-

formed and believe that the defendant has no means at hand with which to meet its immediate pressing needs in operating its system; that many of the creditors to whom the defendant is liable are pressing the defendant for immediate payment, and that some of  
 81 said creditors may bring suits in respect of their said claims, and may levy execution on the lines of railroad owned by the defendant and on the material and supplies and other property of the defendant on hand and kept by the defendant for necessary use in operating said railway system, and your orators allege that there is grave danger that the lines of the defendant may no longer be operated in a single system, but the various lines which are now owned or controlled or leased by the defendant may be broken up and be separately operated; that there is likewise grave danger that suits may be instituted against the defendant in respect of the claims above stated, and that it is essential to the interest of the defendant and to the interest of the public and to your orators that the property of the defendant should not be sacrificed; that the position of the defendant is the more acute by reason of the depressed financial situation; that the gross income of the system decreased during the last fiscal year about six hundred thousand dollars, while the expenses of operation and maintenance increased by about the same amount, an aggregate difference of about one million two hundred thousand dollars; that the claims for special franchise taxes which are now in litigation amount to over three million dollars, and the comptroller of the city of New York is pressing for the payment of these taxes, and that the defendant has not sufficient credit to obtain the funds required for the operation of its properties.

Tenth. And your orators allege, on information and belief, that the only means whereby the defendant can meet its obligations under said lease from said Metropolitan Street Railway Company and pay its floating indebtedness and discharge its current obli-  
 82 gations is by the continued maintenance and operation of said system as a whole by an interrupted use thereof; that any suits upon or process against its properties or its revenues would seriously embarrass and cripple it and diminish, if not destroy, its power successfully to operate said system in the exercise of its franchises; that said system, together with all its appurtenances, rolling stock, and other property connected therewith, are now in a reasonably good state and condition; that the railroads operated by the defendant are so numerous and extensive as to constitute practically the entire street surface railroad system in the county of New York; that during the last year the lines owned or leased by the defendant carried about four hundred million passengers, and the average number of persons employed by the defendant and its various controlled and allied corporations will exceed six thousand; that it is of vital importance to the people of said county of New York that said system shall continue to be operated as a whole, and to this end it is of like importance that said system shall be preserved; that notwith-

standing the fact that every effort has been made to provide funds for the payment of the indebtedness of the defendant, or for the extension of the time of payment thereof, such efforts have proved unsuccessful; that unless some definite action is taken on behalf of all creditors so that the operation of defendant's system may be kept intact, great and severe loss will be inflicted on all creditors; that the credit of the defendant has been seriously impaired; that it has not money to pay the debts which have matured, and has no reasonable hope of finding assistance from any quarter to enable it to do so, and that the defendant is insolvent.

83 Your orators believe unless the court, in view of the facts above set forth, shall take said system of the defendant into judicial custody for the protection of every interest therein that immediately upon default individual creditors will assert their rights and remedies in different courts; that the result will be a multiplicity of suits and a race of diligence; that attempts will be made to secure judgments and priorities; that levies will be made upon cars, rolling stock, material, and supplies indispensable to the operation of the system, which will greatly interfere with and ultimately prevent defendant from the proper performance of its duties as a common carrier, and of its mail and express contracts, and will seriously diminish its earnings; that it will be impossible to operate the system as a whole, and the system of transfers among the lines in said system will be broken up, to the serious inconvenience of the public, and a most important and valuable property dismembered, which might be preserved by adequate judicial protection in this court.

And your orators allege that an attempt by your orators to enforce at law their claims as general creditors would precipitate similar action on the part of other creditors, and this in turn would lead to wasteful strife and controversy, which your orators believe can be avoided, and the property preserved for equitable distribution among those entitled thereto only by the intervention of a court of equity and the granting of equitable relief, including the appointment of a receiver.

Eleventh. That under these circumstances the interference of a court of equity for the protection of your orator's rights is  
84 imperatively required, and especially for the timely appointment of a receiver to take charge of and preserve the property of the defendant, continue the operation of its system for the accommodation of the public, and collect and receive and properly appropriate the income thereof until the final decree of the court in the premises.

Twelfth. That this is a civil suit in the nature of a claim in equity, and the matter in dispute exceeds, exclusive of interest and costs, the sum of five thousand dollars.

Thirteenth. Inasmuch, therefore, as your orators have no adequate remedy at law for their aforesaid grievances and can have relief only in equity, your orators file this bill of complaint in behalf of themselves and other creditors of the defendant who may come in and

contribute to the expense hereof, and pray for equitable relief, as follows:

1. That the rights of your orators and all the other creditors of the defendant may be ascertained and decreed, and that the court will fully administer the fund in which your orators are interested, constituting the entire railroad system and other assets of the defendant, and will for such purpose marshal all the assets of the defendant and ascertain the several and respective liens and priorities thereon, and enforce and decree the rights, liens, and equities of the creditors of the defendant as the same may be finally ascertained and decreed by the court upon respective interventions or applications of each and every such creditor or lienor in and to each and every portion of the assets and property of the defendant.

2. That for the purpose of preserving the unity of the system  
85 of the defendant as it has been maintained and operated, a receiver may be appointed for the defendant and of all the property of the defendant, real, personal, and mixed, of whatsoever kind and description and wheresoever situated, including all railroads owned, leased, or operated, tracks and terminal facilities, rolling stocks, franchises, leases, rights, and properties, with full power to sue for, collect, receive, and take into his possession goods, chattels, rights, credits, moneys, effects, lands, tenements, books, papers, and property of every description of the defendant, and with all the incidental powers ordinarily vested in receivers in like cases, and with full power and authority to run and operate such railroads, estates, and property, and to collect and receive all the rents, issues, profits, and income thereof, and to apply the said income and receipts thereof under the orders or decrees of the court for such period as the court shall order, to protect and preserve the corporate franchises, privileges, and property, and to preserve the corporate existence of the defendant, and to protect and preserve the said railroads, estates, and property, real and personal, from being sacrificed under any proceedings which can or may be taken liable to prejudice or sacrifice the same, and to do any and all acts which may be necessary to preserve valuable rights and franchises of the defendant, or otherwise requisite or proper.

3. That temporarily and pending this suit, an injunction may issue against the defendant and all persons claiming and acting by, through, or under it, and all other persons, to restrain them from interfering with said receiver taking possession of said property, and that your orators may have such further relief in the premises as the nature of the case may require and as may be agreeable to equity.

86 4. That the defendants may be required to answer all and singular the matters above stated.

5. That a writ of subpoena may be granted to your orators to be directed to the defendant, thereby requiring the defendant personally to appear on a certain day before the court and then and there full, true, direct, and perfect answer make to all and singular the

premises (but not under oath, which is hereby expressly waived), and further to perform and abide by such further order, direction, or decree therefor as to the court shall seem meet.

6. That your orators have such further and other relief as the court may deem proper and equitable.

And your orators will ever pray, etc.

BYRNE & CUTCHEON,  
*Solicitors for Complainants.*  
JAMES BYRNE,  
*Of Counsel.*

STATE OF NEW YORK,

*County of New York, Southern District of New York, ss:*

John V. W. Reynders, being duly sworn, deposes and says that he is the vice president of the Pennsylvania Steel Company, one of the complainants above named; that he has read the foregoing bill of complaint and knows the contents thereof and that the same

is true of his own knowledge except as to the matters therein  
87 stated to be alleged on information and belief and as to those matters he believes it to be true.

JOHN V. W. REYNDERS.

Sworn to before me this 24th day of September, 1907.

[SEAL.]

EDMUND KIRBY,  
*Notary Public, New York County, New York.*

STATE OF NEW YORK,

*County of New York, Southern District of New York, ss:*

Nathaniel J. Haywood, being duly sworn, deposes and says that he is the secretary of the Degnon Contracting Company, one of the complainants above named; that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

NATHANIEL J. HAYWOOD.

Sworn to before me this 24th day of September, 1907.

[SEAL.]

EDMUND KIRBY,  
*Notary Public, New York County, New York.*

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Schedule 3.

In the Circuit Court of the United States for the Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY AND THE DEGNON	} In equity.
Contracting Company, complainants,	
<i>against</i>	
NEW YORK CITY RAILWAY COMPANY, DEFENDANT.	

New York City Railway Company, the defendant in this cause, for answer to the bill of complaint herein, or unto so much and such

parts thereof as the defendant is advised it is necessary or material for this defendant to make answer unto, answering, says:

First. The defendant admits all the allegations of said bill of complaint.

Second. The defendant, reiterating the admissions of the preceding article of this answer, joints in the prayer of said bill of complaint, and prays that this court, sitting in equity, may take possession of the system of the defendant through the appointment of a receiver, as prayed in said bill of complaint, and thereby preserve the unity of the system of the defendant as it has been maintained and operated, and protect and preserve the corporate franchises, privileges, and property, and preserve the corporate existence of the defendant, and protect and preserve its said system and its  
89 said property, real and personal, from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and do any and all casts which may be necessary to preserve the valuable rights and franchise of the defendant, and it accordingly prays that, inasmuch as there is no adequate remedy at law in the premises for the complainants or for this defendant, that this court will, for the purposes aforesaid, appoint a receiver as prayed for in said bill of complaint, and empower and authorize such receiver to take possession of the entire property of this defendant, and to preserve, manage, operate, and control the same, pay all indebtedness due or to become due by this defendant, and otherwise discharge all the duties ordinarily imposed by courts upon receivers in similar cases; that on the final hearing in this cause this court will, under said bill of complaint and this answer, or such supplemental bill as shall be filed herein, make such decree or decrees with respect to the property of this defendant as shall deal with the same on general equitable principles, and that this court will cause all the liens upon said property or any part thereof, and all rights and claims in equity of persons interested therein, to be ascertained, defined, and determined, and that the proceeds arising from the sale of said property or any part thereof be applied under the said orders or decrees of this court according to the rights, interest, and equities of the parties interested therein, and that this court will direct all persons in possession of the property of this defendant, or any part thereof, to surrender the same to such receiver or to hold such property under said receiver.

JAMES L. QUACKENBUSH,

*Solicitor for Defendant.*

ALFRED A. GARDNER,

*Of Counsel.*

90 SOUTHERN DISTRICT OF NEW YORK,

*State of New York, County of New York, ss:*

Charles E. Warren, being duly sworn, doth depose and say that he is the secretary of the New York City Railway Company, the defendant in this suit; that he has read the foregoing answer to the

bill of complaint in this suit, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

CHARLES E. WARREN.

Sworn to before me this 24th day of September, 1907.

[L. S.]

EARL E. STABBAED,

*Notary Public.*

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Schedule 4.

In the Circuit Court of the United States for the Southern District  
New York.

THE PENNSYLVANIA STEEL COMPANY AND THE DEGNON	} In equity.
Contracting Company, complainants,	
<i>against</i>	
NEW YORK CITY RAILWAY COMPANY, DEFENDANT.	

In the matter of the petition of Metropolitan Street Railway  
Company.

*To the Judges of the Circuit Court of the United States for the  
Southern District of New York:*

The petition of Metropolitan Street Railway Company, by J. Parker Kirlin, its solicitor, respectfully shows as follows:

First. This cause is a general creditor's suit and is instituted by the complainants as creditors of the defendant for the administration of the assets and property of the defendant. For the contents of the bill of complaint and of the answer of the defendant to said bill, reference is made to said bill and answer of record in this court in this cause.

92 By an order of this court duly entered in this cause on September 24, 1907, made on the bill of complaint and on the answer of the defendant thereto, Adrian H. Joline and Douglas Robinson were duly appointed temporary receivers of the defendant New York City Railway Company and of its property, with the powers and duties prescribed in said order. For the precise terms of said order reference is made to the original order of record in this cause. Said Joline and Robinson have duly qualified as receivers as aforesaid and have entered into possession of the property of said defendant and are now operating the same and collecting the rents, issues, and profits thereof.

Second. Your petitioner is a consolidated corporation under the laws of the State of New York, and by virtue of various consolidations is lawfully vested with the lines of street railway in the City of New York and the appurtenant franchises and property formerly of Lexington Avenue and Pavonia Ferry Railway Company, Columbus and Ninth Avenue Railroad Company, South Ferry Railroad



Company, Broadway Surface Railroad Company, and Metropolitan Crosstown Railway Company.

Your petitioner is also the lessee of the lines of street railway in the city of New York of the following companies which by various indentures of lease, demised their respective lines of railway and the appurtenant franchises and property to the petitioner or its predecessors, or to lessors of the petitioner or its predecessors, for terms now unexpired, to wit:

Broadway and Seventh Avenue Railroad Company.

Sixth Avenue Railroad Company.

Ninth Avenue Railroad Company.

93 Twenty-third Street Railway Company.

Bleecker Street & Fulton Ferry Railroad Company.

Central Park, North and East River Railroad Company.

Forty-second Street and Grand Street Ferry Railroad Company.

Eighth Avenue Railroad Company.

New York and Harlem Railroad Company (City Line).

Second Avenue Railroad Company.

Third Avenue Railroad Company.

Central Crosstown Railroad Company.

Christopher and Tenth Street Railroad Company.

By each of said indentures of lease a right of reentry is reserved to the lessor in the event of default in the payment of the rent of the demised premises.

Third. By indenture of lease bearing date the 21st day of March, 1902, between your petitioner of the one part and the defendant, New York City Railway Company, which then bore the name of Inter-urban Street Railway Company, of the other part, your petitioner leased to said defendant the entire system of street railways of your petitioner, including as well all lines owned by your petitioner, for the term of nine hundred and ninety-nine years from the date of said lease, said lessee agreeing to pay by way of rental therefor, in addition to all taxes and assessments on the demised properties, all rentals payable under the leases of said lines leased to your petitioner and interest on the funded debt of your petitioner and other fixed charges of your petitioner, an amount equal to seven per cent per annum upon the existing capital stock of your petitioner and  
94 upon such additional capital stock of your petitioner as might thereafter be issued with the written consent of said lessee.

Said indenture of lease provides, among other things, that in case said lessee shall fail at any time to pay the rent provided for in said indenture of lease, or shall fail at any time to keep and perform any of the agreements or covenants contained in said lease, and any such default in the payment of rent or in the performance of the covenants of said lease shall continue for the period of twelve months after written demand and notice from your petitioner to said lessee, then, at the option of your petitioner, the estate by said indenture of lease demised shall cease and determine, and your petitioner shall there-

upon become and be entitled to reenter into and upon the demised railroads and properties. Your petitioner files with this petition as Schedule A hereto a copy of said indenture of lease and for a precise statement of the terms and conditions of said indenture of lease prays leave to refer thereto.

Fourth. The various lines of railway embraced in said lease, as well as the lines owned by your petitioners as the lines leased to your petitioner, are subject to funded indebtedness secured by mortgage which is now outstanding, and which so far as not outstanding at the date of the execution and delivery of said lease has since been created with the consent of said lessee, and your petitioner is informed and believes that failure to meet the interest on such underlying funded indebtedness as such interest matures will operate also as a default under the mortgage securing the indebtedness the interest on which shall so become in default, and will render said mortgage enforceable. Said mortgage indebtedness is as follows:

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## I.—ON LINES OWNED BY YOUR PETITIONER.

	Amount outstanding.	When due.	Rate.	Interest when payable.
			<i>Per cent.</i>	
Metropolitan Street Railway Company general and collateral trust mortgage.....	\$12,500,000	Feb. 1, 1907	5	Feb. 1 and Aug. 1.
Metropolitan Crosstown Railway Company first mortgage.....	600,000	Apr. 1, 1920	5	Apr. 1 and Oct. 1.
Lexington Avenue and Pavonia Ferry Rail- road Company first mortgage.....	5,000,000	Sept. 1, 1903	5	Mar. 1 and Sept. 1.
Columbus and Ninth Avenue Railroad Com- pany first mortgage.....	3,000,000	Sept. 1, 1903	5	Mar. 1 and Sept. 1.
South Ferry Railroad Company first mort- gage.....	350,000	Apr. 1, 1919	5	Apr. 1 and Oct. 1.
Broadway Surface Railroad Company first mortgage.....	1,500,000	July 1, 1924	5	Jan. 1 and July 1.
Metropolitan Street Railway Company re- funding mortgage.....	16,000,000	Apr. 1, 2002	4	Apr. 1 and Oct. 1.

## II.—ON LINES LEASED TO YOUR PETITIONER.

Broadway & Seventh Avenue Railroad Company second mortgage.....	\$500,000	July 1, 1914	5	Jan. 1 and July 1.
Broadway & Seventh Avenue Railroad Company first consolidated mortgage.....	7,650,000	Dec. 1, 1943	5	June 1 and Dec. 1.
Central Crosstown Railroad Company first mortgage.....	250,000	Nov. 1, 1922	6	May 1 and Nov. 1.
Central Crosstown Railroad Company first consolidated mortgage (deposited as col- lateral security for the three-year notes of that company to the face amount of \$2,250,000).....	2,490,000	May 1, 1952	4	May 1 and Nov. 1.
96 The Third Avenue Railroad Company first mortgage.....	5,000,000	July 1, 1937	5	Jan. 1 and July 1.
The Third Avenue Railroad Company con- solidated mortgage.....	36,943,000	Jan. 1, 2000	4	Jan. 1 and July 1.
Bleecker Street and Fulton Ferry Railroad Company first mortgage.....	700,000	Jan. 1, 1950	4	Jan. 1 and July 1.
Second Avenue Railroad Company first mortgage.....	1,280,000	Nov. 1, 1909	5	May 1 and July 1.
Second Avenue Railroad Company de- benture bonds.....	89,000	Jan. 1, 1909	5	Jan. 1 and July 1.
Second Avenue Railroad Company first consolidated mortgage.....	5,631,000	Feb. 1, 1948	5	Feb. 1 and Aug. 1.
Christopher and Tenth Street Railroad Com- pany first mortgage.....	210,000	Oct. 1, 1916	4	Apr. 1 and Oct. 1.

Fifth. By said refunding mortgage of your petitioner which is expressed to be subject to said indenture of lease, made by your petitioner to said defendant, your petitioner covenanted from time to time punctually to observe and perform all of the obligations and pay and discharge all amounts payable under or by virtue of any lease thereby mortgaged so that the interest of your petitioner in any such leasehold estate might be at all times preserved unimpaired as security for the bonds issued under said refunding mortgage; and said refunding mortgage provides, among other things, that in case default shall be made in the payment of any interest on any bonds by said refunding mortgage secured or in the payment of the principal of any such bond or in case default shall be made in the due observance or performance of any of the covenants or conditions in said refunding mortgage required to be kept or performed by your petitioner, and any such last mentioned default shall continue for a period of sixty days after written notice thereof to your petitioner from the trustee under said refunding mortgage or from the holders of five per cent or more in amount of the outstanding bonds by said refunding mortgage secured, then the trustee thereunder may forthwith proceed to protect and enforce its rights and the rights of bondholders under said refunding mortgage by a suit or suits in equity or at law for the specific performance of any covenant or agreement contained in said refunding mortgage or in aid of any power therein granted or for the foreclosure of said refunding mortgage for any default, or for the collection of interest or principal, or both, or for the enforcement of any other appropriate legal or equitable remedy as the trustees shall deem most effectual in support of any of its rights and duties under said mortgage. Your petitioner files a copy of said refunding mortgage as Schedule B hereto.

Sixth. It is alleged, among other things in the bill of complaint in this cause and admitted by the answer of the defendant thereto, and your petitioner so charges, that the defendant, said New York City Railway Company, since entering into possession of the premises demised by said lease made to it by your petitioner has operated all the lines owned and leased by said defendant as a single system constituting routes over different lines, or parts of lines, connecting separated lines over parts of intermediate leased or controlled lines, interchanging equipment among various lines, and furnishing equipment as might be required to meet from time to time the varying requirements of particular lines, supplying power and using power houses, car barns, and stations as deemed best for the effective and economical operation of the system as a whole, and also establishing a system of transfers between various lines and routes; that the equipment owned by said defendant has been used over the system as varying requirements of operation made necessary without assignment to any particular line or lines, and that many of

the lines leased by your petitioner to said defendant are without adequate equipment of their own; and that in many cases the motive power employed on leased or controlled lines has been changed to electricity without supplying said lines with independent power houses or other independent sources of supply of power, leaving such lines dependent for power on other lines of the system.

Your petitioner further shows that it is alleged in said bill of complaint in this cause, and is admitted by the answer of the defendant, that the defendant is insolvent; that the fixed charges of your petitioner's system hereinabove set forth are accruing and installments thereof will become due on October 1, 1907, and each month thereafter; that failure to meet such fixed charges as they become due will operate a default under the mortgage securing the indebtedness the interest on which shall so become in default and render such mortgage enforceable; that the rentals under the leases made to your petitioner are accruing, and that instalments of rental under some or all thereof will shortly become payable; that under said lease made to said defendant by your said petitioner no right of reentry by reason of a default in the payment of the rent by said lease reserved or in the performance of any of the agreements or covenants therein contained will accrue thereunder to your petitioner until the

99 expiration of a year after default and written demand and notice from your petitioner and that in the meantime your petitioner's said system may be hopelessly disrupted and your petitioner suffer irremediable loss.

Seventh. Your petitioner alleges that its railroad system embraced in said lease is very extensive; that it is of vital importance to your petitioner and to the creditors of your petitioner that said railroad system should be continued to be operated as a whole, and that said system should be preserved; that by said lease to the defendant the defendant is bound to finance the requirements of your petitioner for capital expenditures; that your petitioner has already issued to the defendant its obligations in large amounts on account of advances by the defendant for that purpose, and your petitioner is informed and believes that the defendant has disposed of said obligations, and that said obligations are now outstanding in the hands of other holders; that claims for personal injuries to a large amount in connection with the operation by your petitioner of its system prior to said lease are now outstanding and are the subject of actions now pending; that by said lease to the defendant the defendant agreed to pay any judgments recovered in respect of said claims; that by said lease made by your petitioner to said defendant your petitioner parted with the possession of its entire railroad system; that your petitioner has no other resources wherewith to meet the fixed charges on the mortgage indebtedness of its said system so leased, or to meet the accruing rentals of said lines so leased to your petitioner or its predecessors, and by your petitioner so leased to said defendant or to meet judgments for said claims for personal injuries, or to

100 meet its said out-standing obligations for capital expenditures as they mature, or to meet other indebtedness or liabilities of your petitioner than the rentals reserved under said lease made by your petitioner to the defendant, as part of which said defendant agreed to pay such fixed charges and such rentals and to perform the other covenants therein contained; that said system is in the possession of this court through its said receivers appointed in this cause for administration in accordance with equitable principles; that no substantial remedial action can be taken in this cause at the instance of said defendant or at the instance of defendant's creditors which will not affect the rights of your petitioner; and that the rights of your petitioner are inextricably interwoven with the rights which this court has undertaken to administer in this cause.

Your petitioner therefore prays—

I. That your petitioner may become party defendant to said suit for the protection of its interests and those of its creditors.

II. That the receivership under the bill of complaint in this cause be extended so as expressly to embrace the interests of your petitioner in said property, your petitioner submitting itself and its property to the jurisdiction of this court.

III. That said receivers be further directed to keep separate accounts not only of the lines owned by said defendant but also of such of the leased lines embraced in your petitioner's system and in your petitioner's said lease as may be deemed practicable, and that the rents, issues, profits, and income be applied under the orders or decrees of this court to the end that said system of your petitioner may be protected and preserved.

101 IV. That your petitioner may have such other and further relief as may be just.

METROPOLITAN STREET RAILWAY COMPANY.

By D. C. MOOREHEAD, *Secretary*.

J. PARKER KIRLIN,

*Solicitor and Counsel for Petitioner,*

*27 William Street, New York.*

SOUTHERN DISTRICT OF NEW YORK,

*State of New York, County of New York, ss:*

D. C. Moorehead, being duly sworn, says: That he is the secretary of the Metropolitan Street Railway Company, the petitioner herein; that he has read the foregoing petition in this cause and knows the contents thereof, and that the same is true of his own knowledge, except the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

D. C. MOOREHEAD.

Sworn to before me this 1st day of October, 1907.

[SEAL.]

EDWARD H. CARPENTER,

*Notary Public, New York County, New York.*

Circuit Court of the United States for the Southern District of  
New York.

MORTON TRUST COMPANY, COMPLAINANT,

*against*

METROPOLITAN STREET RAILWAY COMPANY; NEW YORK

City Railway Company; Adrian H. Joline and

Douglas Robinson, as receivers of New York City

Railway Company; Adrian H. Joline and Douglas

Robinson, as receivers of Metropolitan Street Rail-

way Company; the Pennsylvania Steel Company;

and the Degnon Contracting Company, defendants.

In equity.

*To the judges of the Circuit Court of the United States for the Southern District of New York:*

Morton Trust Company, a corporation organized and existing under the laws of the State of New York and a citizen of said State, brings this, its bill of complaint, against Metropolitan Street Railway Company, a corporation organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, and New York City Railway Company, a corporation organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, and Adrian H. Joline and Douglas Robinson, both citizens of the State of New York, as receivers of said New York City Railway Company, and said Adrian H. Joline and Douglas Robinson, as receivers of said Metropolitan Street Railway Company, and the Pennsylvania Steel Company, a corporation organized and existing under the laws of the State of Pennsylvania and a citizen of said State, and the Degnon Contracting Company, a corporation organized and existing under the laws of the State of New Jersey and a citizen of said State; and thereupon your orator complains and alleges as follows:

I. Your orator is a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of said State.

II. On information and belief, the defendant, Metropolitan Street Railway Company (hereinafter in this bill called "the Metropolitan Company"), is a corporation organized and existing under the laws of the State of New York and a citizen of said State, having been organized by a merger and consolidation at divers times of Houston, West Street & Pavonia Ferry Railroad Company, Broadway Railway Company, South Ferry Railroad Company, the Metropolitan Crosstown Railway Company, the Lexington Avenue & Pavonia Ferry Railroad Company, and the Columbus and Ninth Avenue Railroad Company, and all of said companies having been street surface railroad companies organized and existing under the laws of the State of New York.

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On information and belief, the defendant, New York City Railway Company (hereinafter in this bill called "the New York Company"), is a corporation organized and existing under the laws of the State of New York and a citizen of said State, having been organized under the name and style of "Interurban Street Railway Company;" subsequently and pursuant to proceedings duly had the said Interurban Street Railway Company changed its name, and is now known as "New York City Railway Company."

On information and belief, the defendant, the Pennsylvania Steel Company, is a corporation duly organized and existing under the laws of the State of Pennsylvania and a citizen of said State, and the defendant, the Degnon Contracting Company, is a corporation duly organized and existing under the laws of the State of New Jersey and a citizen of said State.

III. Heretofore and prior to March 21, 1902, the defendant, Metropolitan Company, in the exercise of its powers under the laws of the State of New York, in accordance with resolutions duly passed by its board of directors and by its stockholders at respective meetings thereof duly called and held, duly authorized the issue of a series of bonds, to be executed under its corporate seal and attested by the signatures of its president or one of its vice presidents, and attested by its secretary or an assistant secretary, and to be issued to an amount not exceeding in the aggregate the principal sum of sixty-five million dollars (\$65,000,000) at any one time outstanding, said bonds to be either coupon or registered, the coupon bonds bearing date April 1, 1902, and the registered bonds bearing date at the

time of their respective issue, by the terms of which bonds the  
105 Metropolitan Company promised to pay, in the case of coupon bonds, to the bearer thereof, and in the case of registered bonds to the registered owner thereof or his assigns, at the office or agency of the Metropolitan Company in the city of New York, on the first day of April, in the year 2002, the sum of one thousand dollars (\$1,000) in the case of coupon bonds, and the sum of one thousand dollars (\$1,000) or multiples thereof in the case of registered bonds, gold coin of the United States of America of or equal to the then standard of weight and fineness, and to pay interest thereon, in the case of coupon bonds from April 1, 1902, and in the case of the registered bonds from the first day of April or October, as the case might be, next preceding the date thereof, payable at its said office in like gold coin, semiannually on the first days of April and October in each year, in the case of coupon bonds, upon presentation and surrender, as they might severally mature, of the interest coupons thereto annexed, and in the case of registered bonds to the registered owner thereof or his assigns. The form and tenor of said bonds are fully set forth in the mortgage hereinafter referred to.

IV. On or about March 21, 1902, the Metropolitan Company, being thereunto duly authorized by the action of its board of directors and with the consent of stockholders owning at least two-thirds of the entire capital stock of the Metropolitan Company, such stock having



been represented and voted upon in person or by proxy at a special meeting of the stockholders duly called for that purpose, in pursuance to the statute in such case made and provided, and with the consent of the Board of Railroad Commissioners of the State  
106 of New York, the consent of said stockholders, evidenced by a sworn certificate of the vote of said meeting and the consent of said board, both in due form, having been contemporaneously filed and recorded in accordance with law in the office of the register of the county of New York, in which county the Metropolitan Company had its principal place of business and wherein its property was situated, duly made, executed, and delivered to your orator, as trustee, its certain mortgage or deed of trust dated on that day, wherein and whereby in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding and to secure the performance and observance of all the covenants and conditions therein contained, it granted, bargained, sold, released, conveyed, assigned, transferred, and set over unto your orator, as trustee, its successors and assigns forever, all and singular, the railroads, railroad routes, estates, leaseholds, properties, rights, privileges, and franchises described as follows, to wit:

(Here follows a description of the street surface railroads in the county, city, and State of New York owned by the Metropolitan Street Railway Company, and also a description of several parcels of land with buildings and improvements thereon situated in the county, city, and State of New York owned by the Metropolitan Street Railway Company, part of which are subject to the Metropolitan Street Railway Company's general and collateral trust mortgage and part of which are not; and a description of certain street surface railroads and railroad routes in the county, city, and State of New York  
107 operated by the Metropolitan Street Railway Company, as lessee, under certain leases therein mentioned and described; together with all improvements on said properties; and all the railroads, buildings, privileges, franchises, rights of way, track-age rights, contracts, consents, leaseholds, easements, and other rights and interests, and all tracks and switches, machinery, poles, cables, rolling stock, equipment, cars, horses, implements, furniture, fixtures, and other supplies, and all maps, drawings, profiles, licenses, records, deeds, contracts, agreements, patents, and all tolls, fares, rents, issues, earnings, income, profits, and other benefits and advantages growing out of the said railroads, franchises, and other property, together with the appurtenances; and also all the right, title, and interest of the Metropolitan Street Railway Company in and to certain shares of stock pledged and deposited with the Guaranty Trust Company of New York under the mortgage dated February 1st, 1897, which are specifically enumerated.)

To have and to hold the said described premises and property unto your orator, its successors in the trust, its or their assigns, in trust for the equal and proportionate benefit and security of all holders of

the bonds and coupons issued and to be issued and secured by said mortgage and for the enforcement of the payment of the said bonds and interest when payable according to the tenor, purport, and effect of such bonds and coupons and to secure the performance and observance of and compliance with the covenants and conditions of the said indenture, without preference, priority, or distinction as to lien or otherwise of one bond over any other bond by reason of priority in the issue, sale, or negotiation thereof, or by reason of the purpose of

its issue as in said mortgage or deed of trust more fully set forth. A copy of this mortgage, marked "Exhibit A," is filed herewith, and your orator prays leave to refer to the same as if it were fully set forth in this bill of complaint. Said mortgage was duly recorded in the office of the register of the county of New York, in which the property thereby mortgaged was situated. Your orator duly accepted the trusts therein created, and it was and now is fully authorized and empowered to take and hold in trust the property conveyed to it therein and to execute the trusts reposed in it under and by virtue of the provisions thereof.

V. After the execution and delivery of said mortgage the Metropolitan Company duly made and executed bonds of the issue described in said mortgage of the aggregate par value of sixteen million six hundred and four thousand dollars (\$16,604,400), all of which bonds were duly certified by your orator in all respects as provided in said mortgage, and all of said bonds, as your orator is informed and believes, were duly issued by the Metropolitan Company for a valuable consideration and in accordance with the provisions of said mortgage, and said bonds are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value, and your orator is advised and avers that said bonds so issued as aforesaid and now in all respects valid outstanding obligations of the defendant Metropolitan Company and entitled to the benefit and security of the said mortgage.

VI. Certain of the bonds so issued as aforesaid were certified and delivered by your orator and issued in accordance with the provisions of subdivision (2) of article second of said mortgage against the deposit with your orator as security for the bonds issued and to be issued under said mortgage of the following securities, viz:

109 First mortgage five per cent bonds of the Broadway and Seventh Avenue Railroad Company, due June 1, 1904.....	\$1,497,000.00
Consolidated mortgage seven per cent bonds of the Central Park North and East River Railroad Company, due December 1, 1902.....	1,200,000.00
Second mortgage five per cent bonds of the Broadway Surface Railroad Company, due July 1, 1905.....	1,000,000.00
Five per cent bonds of the Metropolitan Crosstown Railway Company, due May 1, 1901.....	300,000.00
First mortgage six per cent extended bonds of the Twenty-third Street Railway Company, due January 1, 1909.....	250,000.00
First mortgage six per cent extended bonds of the Forty-second Street and Grand Street Ferry Railroad Company, due January 1, 1909.....	236,000.00

Five per cent debenture bonds of the Twenty-third Street Railway Company, due January 1, 1906.....	150,000.00
Bond of John D. Crimmins, due August 1, 1897, secured by mortgage to the Eighth Avenue Railroad Company.....	200,000.00
Bond of John D. Crimmins, due February 20, 1894, secured by mortgage to the Mutual Life Insurance Company of New York.....	150,000.00

Said securities, so deposited with your orator ever since, have been and now are held in trust by it subject to the trusts declared in said mortgage as additional security for the payment of the bonds issued thereunder.

110 VII. Your orator further shows that, as it is informed and believes, simultaneously with or immediately prior to the execution and delivery of the said mortgage, Exhibit A, filed herewith, the Metropolitan Company executed and delivered a certain Indenture of Lease, dated February 14, 1902, between the Metropolitan Company and the defendant the New York Company, then known as Interurban Street Railway Company, under and by virtue of the provisions of which the said Metropolitan Company did grant, lease, and demise to the said Interurban Street Railway Company for the full term of nine hundred and ninety-nine years from February 24, 1902, all its railroads and railroad routes and all its real estate and the buildings and improvements thereon, and all its leasehold interests and leased lines, including all the street surface railroads and real estate owned by it, and all the street surface railroads and railroad routes operated by it as lessee which are described in the said mortgage or deed of trust, Exhibit A, filed herewith, and which were conveyed to your orator subject to the trusts thereof.

The said lease provided that all income which the lessor should receive, or be entitled to receive, from any of its leased lines, or from any stocks, bonds, or other securities now or thereafter held by it, and from every other source whatsoever, should be the property of the lessee; and the said lease further provided that the lessee should, from time to time, pay or cause to be paid, all rentals and other sums of money which were or might be or become due or payable under or by reason of any leases and other contracts to which the lessor was a party or to which any of the demised property was or might be subject, and the lessee agreed to pay all interest upon the funded debt of the lessor and other fixed charges of the lessor.

111 Said lease further provided that the lessee should pay all interest upon all bonds of the lessor thereafter to be issued in accordance with the provisions of the lease.

Your orator alleges on information and belief that all the bonds issued under said mortgage, Exhibit A filed herewith, were issued by the Metropolitan Company in accordance with the provisions of said lease and with the consent of the New York Company, and in and by said indenture of lease the New York Company did agree to pay the interest on said bonds. A copy of said lease is filed herewith, marked "Exhibit B," and your orator prays leave to refer to the same as if it were fully set forth in this bill of complaint.

Shortly after the execution of said lease, as your orator is informed and believes, the New York Company entered into possession of the

said demised railroads and property, and has operated the same and has collected the rents and profits thereof until the appointment of its receivers, as hereinafter mentioned.

VIII. On or about the 24th day of September, 1907, as your orator is informed and believes, the Pennsylvania Steel Company and the Degnon Contracting Company filed their bill in this court against the defendant, the New York Company, alleging its insolvency and praying for the appointment of receivers of its property. Thereafter the New York Company filed its answer to said bill, admitting the allegations thereof, and thereupon and on or about September 24, 1907, by order of this court, the above-named defendants, Adrian H. Joline and Douglas Robinson, were appointed receivers of the said defendant, New York Company, and all of its property, wherever situated, and they were thereby authorized, empowered, 112 and instructed, among other things, to enter upon and take possession of all such property, and to manage, operate, and control the same.

Thereafter, as your orator is informed and believes, the said Adrian H. Joline and Douglas Robinson, appointed receivers as aforesaid, duly qualified as such receivers, and as such receivers entered upon and took possession of the property of the said defendant, New York Company, including the property which is described in the said mortgage dated March 21, 1902, and was conveyed to your orator subject to the trusts thereof, and they have used and operated the same and are now, as such receivers, in possession of said property.

Your orator files herewith a copy of said bill and answer and order, marked "Exhibit C," and prays leave to refer thereto for a precise statement of the contents thereof.

IX. Your orator further alleges, as it is informed and believes, that thereafter the Metropolitan Company presented its duly verified petition to this court, wherein it prayed that it might become a party defendant to said suit of the Pennsylvania Steel Company and the Degnon Contracting Company against the New York Company, and that the receiver ship under the bill of complaint in the said cause be extended so as expressly to embrace the interests of the Metropolitan Company in said property.

Thereafter and on October 1, 1907, by an order of this court, the Metropolitan Company was made a party defendant in said cause and the receivership in said cause was extended to the properties of the Metropolitan Company, as prayed in said petition, and the said Adrian H. Joline and Douglas Robinson, theretofore appointed receivers in said cause, were appointed receivers of the properties of the Metropolitan Company.

113 Thereafter and on October 1, 1907, as your orator is informed and believes, the said Adrian H. Joline and Douglas Robinson duly qualified as such receivers, and as such receivers they are now in possession of all the railroads, properties, and franchises of the Metropolitan Company described in said mortgage dated March 21, 1902,

both as receivers of the Metropolitan Company and as receivers of the New York Company.

Your orator files herewith a copy of said petition and of said order of this court marked "Exhibit D," and prays leave to refer thereto for a precise statement of the contents thereof.

X. It is alleged in said petition, and your orator so charges, that the various lines of railway embraced in said lease to the New York Company, as well the lines owned by the Metropolitan Company as the lines leased to it, are subject to funded indebtedness secured by mortgage which is not outstanding and which so far as not outstanding at the date of the execution and delivery of said lease has since been created, with the consent of said lessee, and that failure to meet the interest of such underlying funded indebtedness as such interest matures will operate also as a default under the mortgage securing the indebtedness the interest on which shall so become in default, and will render said mortgage enforceable. Said petition further shows, and your orator charges, the fact to be that the total amount of such funded indebtedness now outstanding, secured by mortgages (exclusive of the bonds issued and secured under the mortgage to your orator dated March 21, 1902), amounts to upwards of eighty-three million dollars (\$83,000,000) and the amount of annual interest charges thereunder amounts to upwards of three million seven hundred and fifty thousand dollars (\$3,750,000).

114 It is further alleged in said petition, and your orator so charges, that by said lease made by the Metropolitan Company to the New York Company, the Metropolitan Company parted with the possession of its entire railroad system; that the Metropolitan Company has no other resources wherewith to meet the fixed charges on the mortgaged indebtedness of its said system so leased, or to meet the accruing rentals of said lines so leased to the Metropolitan Company or its predecessors, and by the Metropolitan Company so leased to the New York Company, or to meet judgments for claims for personal injuries, or to meet its outstanding obligations for capital expenditures as they mature, or to meet other indebtedness or liabilities of the Metropolitan Company than the rentals reserved under said lease made by the Metropolitan Company to the New York Company as part of which said New York Company agreed to pay such fixed charges and such rentals and to perform the other covenants therein contained.

XI. Your orator further shows that in and by said mortgage of the Metropolitan Company to your orator, dated March 21, 1902, and in and by article fifth thereof, it is, among other things, provided that in case, in any judicial proceedings by any party other than the trustee under said mortgage, a receiver should be appointed of the Metropolitan Company, or a judgment or order entered for the sequestration of its property, the trustee under said mortgage should be entitled forthwith to exercise the right of entry conferred under said mortgage, and also any and all other rights and powers conferred by said mortgage and provided to be exercised by the trustee there-

under upon the occurrence and continuance of default; and that, as  
 matter of right, the trustee thereunder should thereupon be  
 115 entitled to the appointment of a receiver of the railroads,  
 property, and premises thereby mortgaged and pledged, and  
 of the tolls, earnings, income, rents, issues, and profits thereof, with  
 such powers as the court making such appointment should confer.

XII. Your orator is advised, and therefore avers, that by reason  
 of the appointment of receivers of the properties of the Metropolitan  
 Company, as hereinbefore alleged, your orator as trustee under said  
 mortgage dated March 21, 1902, is forthwith entitled to exercise the  
 right of entry conferred by said mortgage, and is entitled to collect  
 and receive all tolls, earnings, incomes, rents, issues, and profits of  
 the mortgaged railroads and premises and every part thereof, and  
 is entitled to have the tolls, earnings, income, rents, issues, and profits  
 of the mortgage property applied in accordance with the provisions  
 of the said mortgage to your orator dated March 21, 1902, and to  
 that end as matter of right is entitled to the appointment of a re-  
 ceiver of the railroads, property, and premises thereby mortgaged  
 and pledged and of the tolls, earnings, income, rents, issues, and  
 profits thereof.

XIII. Your orator further alleges on information and belief that  
 unless the earnings, issues, and profits of the railroads, properties,  
 and premises mortgaged to your orator be applied in accordance  
 with the provisions of said mortgage and unless the fixed charges of  
 the said railroads be paid and the interest on the bonds secured by  
 underlying mortgages on the various portions of the railroad system  
 leased to the New York Company be paid as the same accrues, there  
 is grave danger that the said mortgages, or some of them, may be  
 foreclosed and that the security which your orator now has  
 116 for the protection of the holders of the bonds issued under the  
 said mortgage dated March 21, 1907, may be greatly impaired  
 and the mortgaged property may become disrupted so that the prop-  
 erty embraced in said mortgage will be inadequate security for the  
 payment of the said bonds; and your orator is advised that it is nec-  
 essary for the protection of the interests of the holders and owners  
 of the said bonds that a receiver be appointed in this cause of the rail-  
 roads, property, and premises of the Metropolitan Company mort-  
 gaged and pledged to your orator by said mortgage dated March 21,  
 1902, and of the tolls, earnings, income, rents, issues, and profits  
 thereof, and that unless such receiver be appointed your orator as  
 trustee of the bondholders secured by said mortgage will suffer great  
 and irremediable loss.

XIV. Your orator has been requested by persons owning or rep-  
 resenting, as your orator is informed and believes, a large number  
 of the bonds issued under and secured by said mortgage to your  
 orator dated March 21, 1902, to enforce their rights under said mort-  
 gage and to exercise the powers conferred upon your orator as trustee  
 thereunder.



XV. The said property is now in the possession of this court through its receivers, appointed by its orders as hereinabove set forth, and upon application by your orator leave has been granted to your orator to include as defendants herein the said Adrian H. Joline and Douglas Robinson as receivers of the New York Company and the said Adrian H. Joline and Douglas Robinson as receivers of the Metropolitan Company.

In consideration whereof and for as much as your orator is remediless in the premises according to the strict rules of the common law and can only have relief in a court of equity, where matters of this kind are properly cognizable, your orator therefore prays the aid of this honorable court:

1. That the said defendants may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were herein expressed and they thereupon particularly interrogated but not under oath, answer under oath being hereby expressly waived.

2. That said mortgage or deed of trust may be decreed to be a valid lien upon the property therein described.

3. That it may be adjudged and decreed that a right of entry into and upon all the railroads, rolling stock, property, lands, leaseholds, rights, interests, franchises, and premises and the income thereof conveyed or intended to be conveyed by said mortgage and each and every part thereof has accrued to your orator and that your orator is entitled to have the tolls, earnings, income, rents, issues, and profits of the mortgaged property applied in accordance with the provisions of said mortgage and that said tolls, earnings, income, rents, issues, and profits be so applied.

4. That pending this suit a receiver or receivers be appointed with the usual powers of receivers in like cases of the railroads, property, and premises mortgaged and pledged in said mortgage to your orator, dated March 21, 1902, and of the tolls, earnings, income, rents, issues, and profits thereof, and that such directions may be made with respect to such receivership as may be equitable and proper.

118 5. That your orator may have such other and further relief in the premises or both as may be just and equitable and as to your honors shall seem just.

May it please your honors to grant to your orator a writ or writs of subpoena, to be directed to the said defendants Metropolitan Street Railway Company, New York City Railway Company, Adrian H. Joline, and Douglas Robinson as receivers of New York City Railway Company and Adrian H. Joline and Douglas Robinson as receivers of Metropolitan Street Railway Company, the Pennsylvania Steel Company, and the Degnon Contracting Company, therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named, to be and appear before your honors in this honorable court then and there severally to answer all and singular the matters aforesaid, but not under oath.



answer under oath being hereby expressly waived, and to stand to abide and perform such other and further orders or decrees as to your honors shall seem meet.

[SEAL.]

MORTON TRUST COMPANY,  
By H. M. FRANCIS,  
*Secretary, Complainant.*  
BRONSON WINTHROP,  
*Solicitor for Complainant and of Counsel.*

UNITED STATES OF AMERICA,

*Southern District of New York, City and County of New York, ss:*

Harry M. Francis, being duly sworn, deposes and says that he is the secretary of Morton Trust Company, the above-named complainant; that he has read the foregoing bill of complaint and  
119 knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes the same to be true.

H. M. FRANCIS.

Sworn to before me this 8th day of October, 1907.

[SEAL.]

E. J. BLEEZARDE,  
*Notary Public, Richmond Co.*

Certificate filed in New York Co.

Schedule 6.

In the Circuit Court of the United States for the Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY AND THE  
Degnon Contracting Company  
*against*  
NEW YORK CITY RAILWAY COMPANY ET AL.

And now on this 8th day of November, 1907, this cause came on further to be heard upon the pleadings and the petition of Metropolitan Street Railway Company, verified the 1st day of October, 1907, to be made a party defendant herein, and upon all the proceedings had in the cause, whereupon, on further consideration thereof, the solicitors for all the parties being before the court, it is  
120 Ordered adjudged and decreed as follows, namely: The court finds that the defendant, Metropolitan Street Railway Company, is insolvent, and that its assets and property of every description constitute a fund in which the creditors of said defendant are interested, and that the assets of said corporation should be marshalled and the nature and extent of the rights, liens, equities, and priorities of the several creditors thereof should be ascertained and decreed by the court.

And it is further ordered, adjudged, and decreed that it be referred to William L. Turner, Esquire, heretofore appointed special master in this cause, to take proof of the amount of all claims and demands against the said Metropolitan Street Railway Company and to report the same to this court with all convenient speed.

And it is further ordered, adjudged, and decreed that all claims and demands against the said defendant shall be presented to the said special master on or before the fifteenth day of January, 1908, and that said special master give public notice accordingly by publication twice in each week for a period of three weeks in at least two daily newspapers published in the city of New York, to be selected by him, which said notice shall also contain a statement of the time and place of the first hearing before said special master.

And it is further ordered, adjudged and decreed that Adrian H. Joline and Douglas Robinson, the receivers heretofore appointed herein, file their accounts with the said special master on the 10th day of January, 1908, covering the period from September 24th, 1907, to and including December 31st, 1907, and shall file their accounts every two months thereafter, and that said special master shall examine the same and report thereon to the court from time to time.

121 And all other questions not hereby disposed of and determined are reserved for further adjudication.

Dated New York City, November 8th, 1907.

E. HENRY LACOMBE,  
U. S. C. J.

Filed 9th November, 1907.

#### Schedule 7.

Circuit Court of the United States for the Southern District of New York.

MORTON TRUST COMPANY, COMPLAINANT,  
*against*

METROPOLITAN STREET RAILWAY COMPANY, NEW  
York City Railway Company, Adrian H. Joline  
and Douglas Robinson as receivers of New York  
City Railway Company, Adrian H. Joline and  
Douglas Robinson as receivers of Metropolitan  
Street Railway Company, the Pennsylvania  
Steel Company, and the Degnon Contracting  
Company, defendants.

In equity. Bill  
of foreclosure.

*To the judges of the Circuit Court of the United States for the  
Southern District of New York:*

122 Morton Trust Company, a corporation organized and existing under the laws of the State of New York and a citizen of said State, brings this its bill against Metropolitan Street Railway Company, a corporation organized and existing under and by virtue

of the laws of the State of New York and a citizen of said State; New York City Railway Company, a corporation organized and existing under and by virtue of the laws of the State of New York and a citizen of said State; Adrian H. Joline and Douglas Robinson, both citizens of the State of New York, as receivers of said New York City Railway Company, said Adrian H. Joline and Douglas Robinson as receivers of said Metropolitan Street Railway Company; the Pennsylvania Steel Company, a corporation organized and existing under the laws of the State of Pennsylvania and a citizen of said State; and the Degnon Contracting Company, a corporation organized and existing under the laws of the State of New Jersey and a citizen of said State; and thereupon your orator complains and says as follows:

I. Your orator is a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of said State.

II. On information and belief, the defendant, Metropolitan Street Railway Company (hereinafter in this bill called the Metropolitan Company), is a corporation organized and existing under the laws of the State of New York and a citizen of said State, having been organized by a merger and consolidation at divers times of Houston, West Street & Pavonia Ferry Railroad Company; Broadway Railway Company; South Ferry Railroad Company; the Metropolitan Crosstown Railway Company; the Lexington Avenue & Pavonia Ferry Railroad Company; and the Columbus and Ninth Avenue Railroad Company, all of said companies having been street surface railroad companies organized and existing under the laws of the State of New York.

On information and belief, the defendant, New York City Railway Company (hereinafter in this bill called the New York Company), is a corporation organized and existing under the laws of the State of New York and a citizen of said State. Said defendant was so organized under the name and style of "Interurban Street Railway Company" and subsequently, and pursuant to proceedings duly had, changed its name to "New York City Railway Company."

On information and belief, the defendant, The Pennsylvania Steel Company, is a corporation duly organized and existing under the laws of the State of Pennsylvania and a citizen of said State, and the defendant The Degnon Contracting Company, is a corporation duly organized and existing under the laws of the State of New Jersey and a citizen of said State.

III. Heretofore and prior to March 21, 1902, the defendant, Metropolitan Company, in the exercise of its powers under the laws of the State of New York and in accordance with resolutions duly passed by its board of directors and by its stockholders at respective meetings thereof duly called and held, duly authorized the issue of a series of bonds to be executed under its corporate seal and attested by the signatures of its president or one of its vice presidents, and

attested by its secretary or an assistant secretary, and to be issued to an amount not exceeding in the aggregate the principal sum of sixty-five million dollars (\$65,000,000) at any one time outstanding; said bonds to be either coupon or registered, the coupon bonds bearing date April 1, 1902, and the registered bonds bearing date at the time of their respective issue; by the terms of which bonds the Metropolitan Company promised to pay, in the case of coupon bonds, to the bearer thereof, and in the case of registered bonds to the registered owner thereof, or his assigns, at the office or agency of the Metropolitan Company in the city of New York on the first day of April, in the year 2002, the sum of one thousand dollars (\$1,000) in the case of coupon bonds and the sum of one thousand dollars (\$1,000) or multiples thereof in the case of registered bonds, gold coin of the United States of America of or equal to the then standard of weight and fineness, and to pay interest thereon, in the case of coupon bonds, from April 1, 1902, and, in the case of the registered bonds, from the first day of April or October, as the case might be, next preceding the date thereof, payable at its said office in like gold coin, semiannually, on the first days of April and October in each year, in the case of coupon bonds, upon presentation and surrender, as they might severally mature, of the interest coupons thereto annexed, and, in the case of registered bonds, to the registered owner thereof or his assigns. The form and tenor of said bonds are set forth at large in the mortgage hereinafter referred to.

IV. On or about March 21, 1902, the Metropolitan Company being thereunto duly authorized by the action of its board of directors and with the consent of stockholders owning at least two-thirds of the entire capital stock of the Metropolitan Company, such stock having been represented and voted upon in person or by proxy at a special meeting of the stockholders duly called for that purpose, in pursuance to the statute in such case made and provided, and with the consent of the Board of Railroad Commissioners of the State of New York, the consent of said stockholders evidenced by a sworn certificate of the vote of said meeting and the consent of said board, both in due form, having been contemporaneously filed and recorded in accordance with law in the office of the register of the county of New York, in which county the Metropolitan Company had its principal place of business and wherein its properly was situated, duly made, executed, and delivered to your orator, as trustee, its certain mortgage or deed of trust dated on that day, wherein and whereby in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding and to secure the performance and observance of all the covenants and conditions in said mortgage contained, it granted, bargained, sold, released, conveyed, assigned, transferred, and set over unto your orator, as trustee, its successors and assigns, forever, all and singular, the railroads, railroad routes, estates, leaseholds, properties, rights, privileges, and franchises deccribed as follows, to wit:

(Here follows a description of the street surface railroads in the county, city, and State of New York, owned by the Metropolitan Street Railway Company; and also a description of the real estate owned by the Metropolitan Street Railway Company with the buildings and improvements thereon, situate, lying, and being in the county, city, and State of New York, part of which is subject to the Metropolitan Street Railway Company's general and collateral trust mortgage, and part of which is not; and also a list of the street surface railroads and railroad companies in the county, city, and State of New York operated by the Metropolitan Street Railway Company as lessee under certain leases therein enumerated, together with all and singular the improvements on said properties, the railroads, buildings, privileges, franchises, rights of way, trackage, rights, tracks, consents, leaseholds, easements, and other rights and interests owned by the Metropolitan Street Railway Company, and all and singular the tracks, buildings, improvements, engines, machinery, poles, cables, rolling stock, equipment, cars, horses, tools, implements, furniture, fixtures, and other supplies; and also all maps, drawings, profiles, licenses, records, deeds, contracts, agreements, and patents owned by the Metropolitan Street Railway Company, all of which personal property was declared to be fixtures and appurtenances of the said railroads; and also all present or future improvements and additions made or to be made upon any of said railroads or property and all equipment and renewals or replacements of the same, and also every other railroad which the Metropolitan Street Railway Company would thereafter acquire or construct by means of the proceeds of any of the bonds secured thereby; and also all and singular the tolls, fares, rents, issues, earnings, income, profits, and other benefits and advantages in any wise growing out of the said railroads, franchises, and property, together with the appurtenances; and also the right, title, and interest of the Metropolitan Street Railway Company in and to certain share of stock specifically enumerated which were pledged and deposited with the Guaranty Trust Company of New York under the mortgage dated February 1, 1897.)

To have and to hold the said described premises and property unto your orator, its successors in the trust, its or their assigns, in trust for the equal and proportionate benefit and security of all holders of the bonds and coupons issued and to be issued and secured by said mortgage, and for the enforcement of the payment of the said bonds and interest when payable according to the tenor, purport, and effect of such bonds and coupons and to secure the performance and observance of and compliance with the covenants and conditions of the said indenture, without preference, priority, or distinction as to lien or otherwise, of one bond over any other bond by reason of priority in the issue, sale, or negotiation thereof or by reason of the purpose of its issue as in said mortgage or deed of trust more fully set forth.

All the property so conveyed and mortgaged to your orator as aforesaid is situated within the southern district of New York. Said

mortgage was duly recorded in the office of the register of the county of New York in which the property thereby mortgaged was situated.

Your orator duly accepted the trusts therein created and it was and now is fully authorized and empowered to take and hold in trust the property conveyed to it therein and to execute the trusts reposed in it under and by virtue of the provisions thereof.

A copy of this mortgage marked Exhibit A is filed herewith and your orator prays leave to refer to the same as if it were fully set forth in this bill of complaint.

V. After the execution and delivery of said mortgage, the Metropolitan Company duly made and executed bonds of the issue described in said mortgage of the aggregate par value of sixteen million six hundred and four thousand dollars (\$16,604,000), all of which bonds were duly certified by your orator in all respects as provided in said mortgage, and all of said bonds, as your orator is informed and believes, were duly issued by the Metropolitan Company for a valuable consideration and in accordance with the provisions of said mortgage; and said bonds are now outstanding in the hands of divers persons and corporations who are now the owners and holders thereof for value, and your orator is advised and avers that said bonds so issued as aforesaid are now in all respects valid outstanding obligations of the defendant Metropolitan Company and are entitled to the benefit and security of the said mortgage.

VI. Certain of the bonds so issued as aforesaid were certified and delivered by your orator and issued in accordance with the provisions of subdivision (2) of article second of said mortgage against the deposit with your orator, as security for the bonds issued and to be issued under said mortgage, of the following securities, viz:

First mortgage five per cent bonds of the Broadway and Seventh Avenue Railroad Company due June 1, 1904.....	\$1,497,000.00
Consolidated mortgage seven per cent bonds of the Central Park North and East River Railroad Company due December 1, 1902.....	1,200,000.00
Second mortgage five per cent bonds of the Broadway Surface Railroad Company due July 1, 1905.....	1,000,000.00
Five per cent bonds of the Metropolitan Crosstown Railway Company due May 1, 1901.....	300,000.00
120 First mortgage six per cent extended bonds of the Twenty-third Street Railway Company due January 1, 1909.....	250,000.00
First mortgage six per cent extended bonds of the Forty-second Street and Grand Street Ferry Railroad Company due January 1, 1909.....	236,000.00
Five per cent debenture bonds of the Twenty-third Street Railway Company due January 1, 1906.....	150,000.00
Bond of John D. Crimmins due August 1, 1897, secured by mortgage to the Eighth Avenue Railroad Company.....	200,000.00
Bond of John D. Crimmins due February 20, 1894, secured by mortgage to the Mutual Life Insurance Company of New York.....	150,000.00

Said securities so deposited with your orator ever since have been and now are held in trust by it subject to the trusts declared in said mortgage as additional security for the payment of the bonds issued thereunder.

VII. Of the property so conveyed to your orator as trustee by the said mortgage dated March 21, 1902, your orator, in accordance with

the provisions of said mortgage, released from the lien of said mortgage, as it was authorized to do under the provisions thereof, a portion of the property hereinbefore specifically described as "146th Street, 147th Street, Lenox Avenue, and 7th Avenue property," and included among the property enumerated in paragraph A of Subdivision II of the description of the property conveyed to your orator as hereinbefore set forth as "Real estate not subject to the Metropolitan Street Railway Company's general and collateral trust mortgage," the property so released by your orator being described as follows:

(Here follows a description of the property so released.)

And your orator, in accordance with the provisions of said mortgage, further released from the lien of the said mortgage, as it was authorized to do under the provisions thereof, the property hereinbefore specifically described as "Lenox Avenue and 116th Street property," and included among the property enumerated in paragraph B of Subdivision II of the description of the property conveyed to your orator as hereinbefore set forth as "Real estate subject to the Metropolitan Street Railway Company's general and collateral trust mortgage," said property so released being described as follows:

(Here follows a description of the property so released.)

VIII. Your orator further shows that as it is informed and believes simultaneously with or immediately prior to the execution and delivery of the said mortgage, Exhibit A, filed herewith, the Metropolitan Company entered into a certain indenture of lease dated February 14, 1902, with the defendant the New York Company under its then corporate name of Interurban Street Railway Company, and by said lease the Metropolitan Company did grant, lease, and demise to the defendant New York Company under its said corporate name of Interurban Street Railway Company for the full term of nine hundred and ninety-nine years from February 24, 1902, all its railroads and railroad routes and all its real estate and the buildings and improvements thereon, and all its leasehold interests and leased lines, including all the street surface railroads and real estate owned by it, and all the street surface railroads and railroad routes operated by it as lessee which are described in the said mortgage or deed of trust to your orator, Exhibit A, and which were conveyed to your orator subject to the trusts thereof.

Said lease provided, among other things, that, subject to the provisions therein contained and for the purposes therein specified, the Metropolitan Company, the lessor, might, with the consent of the New York Company, the lessee, issue its bonds, secured by mortgage upon its property, and your orator is informed and believes that all the bonds issued by the Metropolitan Company under the aforesaid mortgage, Exhibit A, were issued in accordance with the provisions contained in said lease and for the purposes therein specified and with the consent of the lessee, the New York Company.



A copy of said lease is filed herewith, marked "Exhibit B." and your orator prays leave to refer to the same as if it were fully set forth in this bill of complaint.

Shortly after the execution of said lease, as your orator is informed and believes, the New York Company entered into possession of the said demised railroads and property and has operated the same and has collected the rents and profits thereof until the appointment of its receivers as hereinafter mentioned.

IX. On or about the 24th day of September, 1907, the Pennsylvania Steel Company and the Degnon Contracting Company filed their bill in this court against the defendant New York Company, alleging facts, as your orator is advised, constituting insolvency  
132 of the New York Company and praying for the appointment of receivers of its property. Thereafter the New York Company filed its answer to said bill admitting the allegations thereof, and thereupon, and on or about September 24, 1907, by order of this court, the above-named defendants, Adrian H. Joline and Douglas Robinson, were appointed receivers of said New York Company and of all its property, wherever situated, and they were thereby authorized, empowered, and instructed, among other things, to enter upon and take possession of all such property and to manage, operate, and control the same.

Thereafter the said Adrian H. Joline and Douglas Robinson, appointed receivers as aforesaid, duly qualified as such receivers, and as such receivers entered upon and took possession of the property of said defendant New York Company, including the property which is described in the said mortgage dated March 21, 1902, and was conveyed to your orator subject to the trusts thereof, and they have since used and operated the same, and are now, as such receivers, in possession of said property.

Your orator files herewith a copy of said bill and answer and order, marked "Exhibit C." and prays leave to refer thereto for a precise statement of the contents thereof.

X. Your orator further alleges that thereafter the Metropolitan Company presented its duly verified petition to this court, wherein it alleged facts, as your orator is advised, constituting insolvency of the Metropolitan Company, and prayed that it might become a party defendant to said suit of the Pennsylvania Steel Company and the Degnon Contracting Company against the New York  
133 Company, and that the receivership under the bill of complaint in the said cause be extended so as expressly to embrace the interests of the Metropolitan Company in said property.

Thereafter and on October 1, 1907, by an order of this court, the Metropolitan Company was made a party defendant in said cause, and the receivership in said cause was extended to the properties of the Metropolitan Company as prayed in said petition, and the said Adrian H. Joline and Douglas Robinson, theretofore appointed receivers in said cause, were appointed receivers of the properties of the Metropolitan Company.

Thereafter and on or about October 1, 1907, as your orator is informed and believes, the said Adrian H. Joline and Douglas Robinson duly qualified as such receivers, and as receivers as aforesaid they are now in possession of all the railroads, properties, and franchises of the Metropolitan Company described in said mortgage dated March 21, 1902.

Your orator files herewith a copy of said petition and of said order of this court marked "Exhibit D" and prays leave to refer thereto for a precise statement of the contents thereof.

XI. Thereafter and on or about October 9th, 1907, your orator filed its bill in this court (leave having been granted to your orator so to do) against the Metropolitan Company, the New York company, said Adrian H. Joline and Douglas Robinson, as receivers of the New York company, said Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Company, the Pennsylvania Steel Company and the Degnon Contracting Company alleging that unless the income and profits of the mortgaged premises were applied in accordance with the provisions of said mortgage the mortgaged premises would be wasted and the mortgage security become greatly impaired, and praying that a receiver of the mortgaged property be appointed and the income and profits thereof be applied in accordance with the provisions of said mortgage.

Thereafter and on or about October 9th, 1907, said Adrian H. Joline and Douglas Robinson were by an order of this court appointed under the said bill of complaint in said cause receivers of all the railroads, properties, and premises mortgaged and pledged under the said mortgage dated March 21, 1902, and of all the tolls, earnings, income, rents, issues, and profits of said railroad, property, and premises, and thereafter duly qualified as such receivers.

Your orator files herewith a copy of said bill of complaint, marked "E," and of said order, marked "F," and prays leave to refer thereto for a precise statement of the contents thereof.

XII. Further complaining, your orator shows that the property granted and conveyed to your orator under the said mortgage dated March 21, 1902, Exhibit A, was so granted and conveyed to secure the performance and observance of all the covenants and conditions contained in said mortgage, and that in and by the mortgage, Exhibit A, the Metropolitan Company did agree and covenant, among other things, that it would from time to time punctually observe and perform all of the obligations and pay and discharge all amounts payable under or by virtue of any lease thereby mortgaged so that the interest of the Metropolitan Company in any such leasehold estate might be at all times preserved unimpaired as security for the bonds issued under said mortgage.

135 XIII. Your orator alleges that among the leasehold estates mortgaged to your orator under said mortgage, Exhibit A, is the leasehold estate demised to the Metropolitan Company under a certain indenture of lease made on or about April 13, 1900, between the Third Avenue Railroad Company (hereinafter in this bill of

complaint called the Third Avenue Company) and the defendant Metropolitan Company, which lease was subsequently by an agreement made on or about May 13, 1900, between the said parties, in certain respects modified and corrected.

A copy of said lease, marked "Exhibit G," and of said agreement, marked "Exhibit H," is filed herewith, and your orator prays leave to refer to the same as if they were fully set forth in this bill of complaint.

XIV. In and by said lease, Exhibit G, the lessee, the defendant Metropolitan Company, did agree among other things to pay to the lessor, the Third Avenue Company, a certain annual rental, and as a part of such annual rental did agree from and after the expiration of six years from the date of said lease, to wit, from and after the 13th day of April, 1906, for a period of four years thereafter, to pay to the lessor, the Third Avenue Company, quarter yearly, a dividend upon the outstanding capital stock of the Third Avenue Company at the rate of six (6) per centum per annum.

XV. Your orator is advised that in accordance with the provisions of said lease there became due and payable on October 13th, 1907, to the Third Avenue Company an instalment of rent for the quarter ending on that day amounting to a dividend of one and one-half per centum on the said outstanding capital stock of the Third Avenue Company.

136 Your orator is informed and believes that the defendant Metropolitan Company has not paid or caused to be paid the said instalment of rent payable as aforesaid, but has wholly failed and neglected so to do, and the said Metropolitan Company has therein wholly made default, and the said instalment of rent remains and is now wholly due and unpaid and in default; that the entire property of the Metropolitan Company is in the hands of said Joline and Robinson, receivers as aforesaid, and that said Joline and Robinson, both as receivers of the New York Company and as receivers of the Metropolitan Company, acting in accordance with the directions of this court in respect thereto, have failed to pay said instalment of rent, and have made default in respect thereto.

Your orator is advised and so charges that such default in the payment of the aforesaid rent due and payable under said lease, Exhibit G, is and constitutes a default by the Metropolitan Company in the due observance and performance by it of the covenants and conditions required in said mortgage, Exhibit A, to be kept and performed by it, and that the Metropolitan Company ever since has been and now is in default in respect thereto.

XVI. Further complaining, your orator alleges on information and belief, that the various lines of railway embraced in said lease of the Metropolitan Company to the New York Company, Exhibit B, as well the lines owned by the Metropolitan Company as the lines leased to it, are subject to funded indebtedness secured by mortgage which is now outstanding, and that failure to meet the interest on such underlying funded indebtedness as such interest matures

137 will operate also as a default under the mortgage securing the indebtedness, the interest on which shall so become in default, and will render said mortgage enforceable; and that the total of such funded indebtedness now outstanding, secured by mortgages (exclusive of the bonds issued and secured under the mortgage to your orator, dated March 21, 1902), amounts to upwards of eighty-three million dollars (\$83,000,000), and that the annual interest charges thereunder amount to upwards of three million seven hundred and fifty thousand dollars (\$3,750,000).

Your orator charges that by said lease made by the Metropolitan Company to the New York Company, the Metropolitan Company parted with the possession of its entire railroad system; that the Metropolitan Company has no other resources wherewith to meet the fixed charges on the mortgage indebtedness of its said system so leased, and embraced in said mortgage to your orator, or to meet the accruing rentals of said lines so leased to the Metropolitan Company or its predecessors and by the Metropolitan Company so leased to the New York Company and embraced in said mortgage to your orator, or to meet other indebtedness or liabilities of the Metropolitan Company than the rentals reserved under said lease made by the Metropolitan Company to the New York Company as part of which said New York Company agreed to pay such fixed charges and such rentals and to perform the other covenants therein contained, and that said Metropolitan Company is now insolvent and unable to meet its obligations, and by reason of the matters hereinbefore alleged, it is and will be unable to perform its covenants and obligations under said mortgage dated March 21, 1902.

138 Your orator further charges that the New York Company is insolvent and unable to meet its obligations, and that by a decree made by this court on or about October 25, 1907, in the suit above mentioned of the Pennsylvania Steel Company and the Degnon Contracting Company against the New York Company this court did order, adjudge, and decree and find that the said New York Company was insolvent, and your orator alleges that the said New York Company and said receivers thereof have failed and neglected to pay the instalment of rent due and payable by it on October 15, 1907, under the said lease of the Metropolitan Railway Company to the New York Company, Exhibit B, and have therein wholly made default and have also failed and neglected to pay the instalment of rent due on October 13th, 1907, under the lease of the Third Avenue Company to the Metropolitan Company and are in default thereunder as hereinbefore alleged.

XVII. It is provided among other things by said mortgage to your orator, Exhibit A, that upon filing a bill in equity or upon other commencement of judicial proceedings by your orator to enforce any right under said mortgage, your orator should be entitled, as a matter of right, to the appointment of a receiver of the railroads, property, and premises thereby mortgaged and pledged to your orator and of the tolls, earnings, revenue, rents, issues, profits, and other income

thereof with such powers as the court or courts making such appointment should confer. Your orator alleges on information and belief that the property subject to the lien of the mortgage to your orator, Exhibit A, is inadequate security for the protection of the holders of the bonds issued thereunder, and unless receivers of such mort-  
 139 gaged property be appointed the interests of your orator and of the bondholders it represents will be greatly injured and the value of the security which your orator has for their protection will be further greatly impaired and diminished and that it is necessary for the protection of your orator and of the holders of said bonds that a receiver or receivers be appointed in this cause of the railroad property and premises mortgaged and pledged to your orator and of the tolls, earnings, revenue, rents, issues, profits, and other income thereof.

XVIII. Your orator has been requested by persons owning or representing a large number of the bonds issued under and secured by said mortgage to your orator dated March 21, 1902, to enforce their rights under said mortgage and to institute proceedings for the foreclosure of the property mortgaged and pledged thereunder.

XIX. Your orator further shows that no proceedings at law or suits in equity have been begun or commenced by your orator save as above mentioned or, as your orator is informed and believes, by any holder of any of the bonds secured by said mortgage dated March 21, 1902, or of any coupons thereto attached, to enforce the payment of the sums so covenanted to be paid by the Metropolitan Company under the terms of the said mortgage and that the amount in controversy in this suit exceeds five thousand dollars.

XX. The said property mortgaged and pledged to your orator as aforesaid is now in the possession of this court through its receivers, appointed by its orders as hereinabove set forth, and upon  
 140 application by your orator leave has been granted to your orator to include as defendants herein the said Adrian H.

Joline and Douglas Robinson, as receivers of the New York Company, and the said Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Company.

In consideration whereof and for as much as your orator is remediless in the premises according to the strict rules of the common law and can only have relief in a court of equity where matters of this kind are properly cognizable, your orator therefore prays the aid of this honorable court:

1. That the said defendants may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were herein expressed and they thereunto particularly interrogated, but not under oath, answer under oath being hereby expressly waived.

2. That an account may be taken of all property subject to the lien of said mortgage dated March 21, 1902, and that said mortgage may be decreed to be a valid lien upon all and singular the railroads, railroad routes, estates, leaseholds, properties, premises, rights, privileges,

and franchises therein described, and upon all stocks, bonds, and other securities mortgaged and pledged to your orator or held by it subject to the provisions of said mortgage (save and except such property as has been released from the lien thereof as in this bill particularly described), that an account be had of all improvements and additions made since the date of said mortgage upon and to any of said railroads or property, real and personal, and any and all equipment therefore and renewals or replacements of the same or of

any part thereof or of the appurtenances and also of all and  
141 every other railroad which the defendant, Metropolitan Street

Railway Company, has acquired or constructed since the date of said mortgage by means of the proceeds of any of the bonds secured by said mortgage and all power houses, real estate, equipment, and other property, real and personal, appurtenant thereto, and that said mortgage or deed of trust may be declared to be a valid lien upon all such property.

3. That unless the defendant, the Metropolitan Street Railway Company, pay within a short day, to be fixed by this court, into this court or unto the Third Avenue Railroad Company or to the persons entitled thereto the rental due and payable on October 13th, 1907, under the lease between the Third Avenue Railroad Company and the defendant, Metropolitan Street Railway Company, dated April 13, 1900, and unless the said defendant pay to your orator the costs, expenses, and allowances of this suit in that behalf incurred or expended, then that the said defendant, Metropolitan Street Railway Company, and all persons claiming under or through it, may be forever barred and foreclosed of and from any equity of redemption of and claim of and in the railroads, property, and premises conveyed to your orator as trustee and described in said mortgage dated March 21, 1902, and all other property declared to be subject to the lien of said mortgage; that all and singular the railroads, railroad routes, estates, leaseholds, properties, premises, rights, contracts, equipment, privileges, and franchises mortgaged and pledged to your orator (save and except such property as has been released from the lien of said mortgage as aforesaid), and all stocks, bonds, and other securities

mortgaged and pledged to your orator or held by it subject to  
142 the lien of said mortgage, and all other property which may be

declared by this court to be subject to the lien of said mortgage, may be sold in one parcel and as an entirety under a decree of this honorable court; that it may be decreed that upon such sale the whole of the principal sum of the bonds secured by said mortgage be immediately due and payable; that the proceeds of said sale may be brought into this court to be administered by it as may be equitable and proper; that an account may be taken of the bonds secured by said mortgage dated March 21, 1902, and of the amount due on said bonds for principal or interest or otherwise; and that in case of the insufficiency of such proceeds or of such portion thereof as may be applicable thereto to pay in full the amount of the principal and interest so due and unpaid upon the bonds secured by said mortgage



dated March 21, 1902, then outstanding, a judgment may be rendered in this cause for such deficiency against the defendant, Metropolitan Street Railway Company.

4. That pending this suit a receiver or receivers be appointed with the usual powers of receivers in like cases of the railroads, property, and premises mortgaged and pledged in said mortgage to your orator, dated March 21, 1902, and of the tolls, earnings, income, rents, issues, and profits thereof, and that such directions may be made with respect to such receivership as may be equitable and proper, and that pending this suit a writ of injunction may be issued out of and under the seal of this honorable court directing, commanding, enjoining, and restraining the said defendant, Metropolitan Street Railway Company, its officers, directors, and agents, and all other persons whomsoever, from interfering with, transferring, selling, or disposing of any of the property of the said Metropolitan Street Railway Company under the control of said receiver or receivers and from selling, transferring, conveying, or otherwise disposing of or encumbering any of the property, rights, or franchises of the said Metropolitan Street Railway Company.

5. That your orator may have such other and further relief in the premises as may be just and equitable and as to your honors shall seem just.

May it please your honors to grant to your orator a writ or writs of subpoena to be directed to the said defendants, Metropolitan Street Railway Company, New York City Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company, and Adrian H. Joline and Douglas Robinson as receivers of Metropolitan Street Railway Company, the Pennsylvania Steel Company, and the Degnon Contracting Company, therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named, to be and appear before your honors in this honorable court, then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand, to abide and perform such other and further orders or decrees as to your honors shall seem meet.

[SEAL.]

MORTON TRUST COMPANY,

By H. M. FRANCIS,

*Secretary, Complainant.*

BRONSON WINTHROP,

*Solicitor for Complainant and of Counsel.*

144 UNITED STATES OF AMERICA,

*Southern District of New York, City and County of New York, ss:*

Harry M. Francis, being duly sworn, deposes and says that he is the secretary of Morton Trust Company, the above-named complainant; that he has read the foregoing bill of complaint and knows the



contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes the same to be true; that the seal affixed to said bill of complaint is the corporate seal of said complainant, and was so affixed by its authority.

H. M. FRANCIS.

Sworn to before me this 9th day of November, 1907.

[SEAL.]

E. J. BLEEZARDE,  
*Notary Public, Richmond Co.*

Certificate filed in New York Co.

145 Schedule 8.

Circuit Court of the United States for the Southern District of New York.

GUARANTY TRUST COMPANY OF NEW YORK, COMPLAINANT,  
*against*

METROPOLITAN STREET RAILWAY COMPANY, ADRIAN H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company; New York City Railway Company, Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company; Morton Trust Company, the Pennsylvania Steel Company and the Degnon Contracting Company, defendants.

In equity.

*To the Judges of the Circuit Court of the United States for the Southern District of New York:*

Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York, and a citizen of said State, brings this bill of complaint against Metropolitan Street Railway Company, a corporation organized and existing under and by virtue of the laws of the State of New York and a citizen of said State; Adrian H. Joline and Douglas Robinson,

146 both citizens of the State of New York, as receivers of said Metropolitan Street Railway Company; New York City Rail-

way Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State; Adrian H. Joline and Douglas Robinson, as receivers of said New York City Railway Company; the Morton Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, as trustee under a mortgage made by Metropolitan Street Railway Company, dated March 21, 1902; the Pennsylvania Steel Company, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen of said State, and the Degnon Contracting Company, a corporation organized and existing under the laws of

the State of New Jersey, and a citizen of said State, and thereupon your orator respectfully shows:

First. Your orator is a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, and is authorized by law to accept and execute trusts of the character hereinafter set forth.

Second. On information and belief, the defendants, Metropolitan Street Railway Company, New York City Railway Company, and Morton Trust Company, are respectively corporations organized and existing under the laws of the State of New York and citizens of said State.

On information and belief, the defendant The Pennsylvania Steel Company, is a corporation duly organized under the laws of the State of Pennsylvania, and a citizen of said State, and the defendant

147 The Degnon Contracting Company, is a corporation duly organized and existing under the laws of the State of New Jersey and a citizen of said State, and the defendants Adrian H. Joline and Douglas Robinson, are citizens of the State of New York.

Third. Heretofore and prior to 14th day of June, 1897, the defendant, the Metropolitan Street Railway Company, being thereunto duly authorized by law, and in accordance with resolutions duly passed by its board of directors and by its stockholders at meetings duly called and held, authorized a series of bonds to be executed under its corporate seal and signed on its behalf by its president, or one of its vice presidents, and attested by its secretary or treasurer, and to be issued to an amount not exceeding in the aggregate the principal sum of twelve million five hundred thousand dollars (\$12,500,000); such bonds to be twelve thousand five hundred (12,500) in number and for the sum of one thousand dollars (\$1,000) each; to bear interest at the rate of five (5) per centum per annum; to bear date February 1st, 1897; to be payable February 1st, 1997; to have interest coupons annexed; to contain a provision for registration, and to be numbered consecutively from one (1) to twelve thousand five hundred (12,500) inclusive, by the terms of which bonds the Metropolitan Street Railway Company promised to pay to the bearer thereof, or, if registered, to the registered owner thereof, at the office or agency of said railway company in the city of New York on the 1st day of February, 1997, the sum of one thousand dollars (\$1,000), in gold coin of the United States of the then standard of weight and fineness, and to pay interest thereon in like gold coin semi-annually at said office or agency at the rate of five (5) per centum per annum on the 1st days of February and August in each year, on the  
148 presentation and surrender of the respective interest coupons annexed to said bonds as they severally fell due, the form of said bonds being more fully set forth in the mortgage dated February 1st, 1897, and hereinafter referred to.

Fourth. On or about the 14th day of June, 1897, the Metropolitan Street Railway Company, being thereunto duly authorized by the

action of its board of directors, and with the consent of stockholders owning at least two-thirds of the entire capital stock of said railway company, and with the consent of the Board of Railroad Commissioners of the State of New York, the consent of said stockholders and of said board in due form having been contemporaneously filed and recorded in accordance with law in the office of the register of the county of New York, in which county said railway company had its principal place of business, and wherein its property was situated, duly made, executed, and delivered to your orator as trustee its certain mortgage or deed of trust dated February 1st, 1897, wherein and whereby, in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding and to secure the performance and observance of all the covenants and conditions in said mortgage contained, it granted, bargained, sold, released, conveyed, assigned, transferred, and set over unto your orator as trustee, its successors and assigns, forever, all and singular the railroads, railroad routes, estates, leaseholds, properties, rights, privileges, and franchises described as follows, to wit:

First. All and singular its property and franchises of every nature and description whatsoever, including all its lands, build-  
149 ings and real estate in the city of New York, and all its railroads, railroad properties, and railroad routes then constructed and in operation, and all its franchises to maintain, construct and operate said railroads, and to exact fares thereon, including particularly the railways, properties, and franchises formerly of the following named companies, with any and all additions thereto and extensions thereof then constructed and in operation, viz:

(Here follows a list of the companies and lines of railway referred to.)

Together with all the horses, cars, carriages, tools, chattels, machinery, motors, engines, and equipment of every description then used or which might thereafter be used and employed upon the said several lines or routes, whether then owned by the railway company or thereafter to be acquired for use upon or in connection with said several lines of railway.

Second. All the right, title, and interest of the railway company in and to the railroads, railroad tracks, railroad routes and franchises, equipment, real estate, contracts and contract rights, and other property of every nature and description whatsoever, described and included in the following-described instruments of lease, viz:

(Here follows a list of the leases referred to.)

150 Third. All and singular the lots, pieces, or parcels of land, with all and singular the buildings and improvements thereon, situate, lying, and being in the city, county, and State of New York, and bounded and described as follows:

(Here follows a description of the parcels of land, with the buildings and improvements thereon, referred to.)

Fourth. All the shares and capital stock of certain corporations, described as follows, viz:

(Here follows a list of the shares and capital stock of the corporations referred to.)

Together with all and singular the rights, privileges, and franchises of the railway company connected with or necessary for the operation of the said several lines of railway hereinbefore described, and all the horses, cars, carriages, tools, chattels, machinery, motors, engines, and equipment of every description then used or which might thereafter be used or employed upon said several lines or routes, whether then owned by the railway company or thereafter to be acquired for use on, upon, or in connection with the same, together with all and singular the tenements, hereditaments, or appurtenances belonging to or in anywise appertaining to any of the lands, railways, or property hereinbefore described, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity of the railway company, of, in, and to the same and every part and parcel thereof, with the appurtenances.

To have and to hold the said described premises and property unto your orator and its successors and assigns forever  
151 in trust nevertheless (subject to each and all of the provisions in said deed of trust set forth) for the persons, corporations, firms, and partnerships who should from time to time hold the said bonds and the interest coupons aforesaid, or any or either of them, and for enforcing the payment thereof and the interest due thereon, when payable, in accordance with the true intent and meaning of the stipulations of said deed of trust and of said bonds and coupons.

All the property so conveyed and mortgaged to your orator as aforesaid is situated within the southern district of New York. Said mortgage was duly recorded in the office of the register of the county of New York, in which the property thereby mortgaged was situated. Your orator duly accepted the trusts thereby created, and it was and now is fully authorized and empowered to take and hold in trust the property conveyed to it therein, and to execute the trusts reposed in it under and by virtue of the provisions thereof. A copy of said mortgage is hereto annexed marked "Exhibit A." to which your orator prays leave to refer as if it were fully set forth in this bill of complaint.

Fifth. After the execution and delivery of said mortgage the Metropolitan Street Railway Company duly made and executed bonds of the issue described in said mortgage of the aggregate par value of twelve million five hundred thousand dollars (\$12,500,000), all of which bonds were duly certified by your orator in all respects as provided in said mortgage, and all of said bonds, as your orator is informed and believes, were duly issued by the Metropolitan Street

152 Railway Company for a valuable consideration and in accordance with the provisions of said mortgage and said bonds are now outstanding in the hands of divers persons and corporations, who are now the owners and holders thereof, for value, and your orator is advised and avers that said bonds so issued as aforesaid are now in all respects valid outstanding obligations of the defendant, Metropolitan Street Railway Company, and are entitled to the benefit and security of the said mortgage.

Sixth. Of the property so conveyed to your orator as trustee by the said mortgage, dated February 1st, 1897, your orator, in accordance with the provisions of said mortgage, released from the lien of the said mortgage, as it was authorized to do under the provisions thereof, the property hereinbefore specifically described as "Lexington Avenue and 116th Street," said property so released being described as follows:

(Here follows a description of the property so released.)

Seventh. Your orator further shows that on February 1st, 1908, the Metropolitan Street Railway Company made default in the payment of the interest then falling due upon the bonds duly issued and certified under said mortgage or deed of trust, and outstanding, and omitted and refused to pay such interest, although certain of the interest coupons appertaining to said bonds and maturing February 1st, 1908, were duly presented for payment at the office or agency of said railway company in the city of New York and payment thereof demanded.

153 Eighth. Your orator further shows that by said mortgage or deed of trust the Metropolitan Street Railway Company promised to pay from time to time all taxes, assessments, and other charges lawfully imposed on the property thereby mortgaged and conveyed, or any part thereof, the lien of which might or could be held to be a lien prior to the lien of said mortgages, so that the priority of said mortgage might be duly preserved, and your orator further shows upon information and belief that the Metropolitan Street Railway Company has made default in the payment of certain of the taxes lawfully assessed upon said mortgaged property, or some part thereof, by reason whereof the said mortgaged premises, or some part thereof, have become subject to a lien prior to the lien of said mortgage to your orator, and such taxes having priority over the lien of said mortgage have remained in arrears for the space of one year after the same became due and payable.

Ninth. Your orator further shows that by the sixth article of said mortgage, or deed of trust, it was provided as follows:

"Sixth. Upon the filing of a bill in equity, or other commencement of judicial proceedings, to enforce the rights of the trustee and of the bondholders under these presents, the trustee, pending such proceedings, shall be entitled, without further notice, to apply for and secure the appointment of a receiver of the property hereby mortgaged and of the income, rents, issues, and profits thereof."

Your orator further shows that by the third article of said mortgage, or deed of trust, it was provided among other things, as follows:

154     "Third. If default shall be made in the payment of all or any part of any instalment of the interest hereby secured to be paid, and should the same remain unpaid and in arrears for the space of ninety days after demand, or should any taxes or assessments upon the said mortgaged premises, or other charges having priority over the lien of this mortgage, remain in arrears for the space of one year after the same shall become due and payable, then and in that event, after the lapse of said periods respectively, the entire principal sum secured by said bonds then outstanding, together with all arrearage of interest thereon, shall forthwith become due and payable, provided a majority in interest of the holders of said bonds shall so elect and certify their said election in writing to the trustee or its successors, signed by them or their lawful attorneys, and duly acknowledged, even though the time in said bonds limited for the payment thereof shall not then have expired, anything in said bonds contained to the contrary thereof notwithstanding."

No such election by a majority in interest of the holders of said bonds to declare the principal thereof due, has been certified or otherwise communicated to the trustee in writing or otherwise.

Your orator further shows that by article fifteen of said mortgage, or deed of trust, it was provided, among other things, as follows:

155     "Until default on the part of the railway company in the performance of any of the premises, covenants, or undertakings herein set forth, and the lapse respectively of the periods specified in article third, or until a receiver of the mortgaged property shall have been appointed, as provided in article sixth, the said party of the first part shall have the right to remain in possession of all the railroad premises and property hereinbefore granted and hereby mortgaged, and shall be suffered and permitted to possess and enjoy the same."

And your orator charges that by virtue of the facts hereinbefore shown, and of the covenants in said mortgage or deed of trust contained, your orator is now entitled, by reason of the aforesaid defaults of the Metropolitan Street Railway Company, to possess and enjoy the said mortgaged premises and the rents, issues, and profits thereof for the benefit, security, and protection of the holders of said mortgage bonds and coupons, either directly or through a receiver or receivers to be appointed under this bill of complaint.

Tenth. Your orator further shows that, as it is informed and believes, subsequent to the execution and delivery of said mortgage dated February 1st, 1897, the Metropolitan Street Railway Company entered into a certain indenture of lease dated February 14th, 1902, with the defendant The New York City Railway Company under its then corporate name of Interurban Street Railway Company, and by said lease the Metropolitan Street Railway Company did grant, lease, and demise to the defendant The New York City Railway Company,



under its said corporate name of Interurban Street Railway Company, for the full term of nine hundred and ninety-nine years from

February 24th, 1902, all its railroads and railroad routes, and  
 156 all its real estate, and the buildings and improvements thereon,  
 and all its leasehold interests and leased lines, including all the  
 street surface railroads and real estate owned by it, and all the street  
 surface railroads and railroad routes operated by it as lessee, includ-  
 ing all those which are described in the aforesaid mortgage or deed  
 of trust to your orator, and which were conveyed to your orator sub-  
 ject to the trusts thereof. After the execution of said lease, as your  
 orator is informed and believes, the New York City Railway Com-  
 pany entered into possession of the said demised railroads and prop-  
 erty, and has operated the same, and has collected the rents and  
 profits thereof until the appointment of its receivers as hereinafter  
 mentioned.

Eleventh. Your orator further shows, as it is informed and be-  
 lieves, simultaneously with or immediately after the execution and  
 delivery of the said lease, the Metropolitan Street Railway Company  
 made, executed, and delivered to the defendant Morton Trust Com-  
 pany, as trustee, its certain mortgage or deed of trust dated March  
 21st, 1902, to secure the payment of a series of bonds bearing date  
 April 1st, 1902, to be issued to an amount not exceeding in the ag-  
 gregate the principal sum of sixty-five million dollars (\$65,000,000),  
 by which mortgage or deed of trust it granted, bargained, sold,  
 released, conveyed, assigned, transferred, and set over unto the said  
 trustee all its railroads and railroad routes, and all its real estate and  
 the buildings and improvements thereon, and all its leasehold inter-  
 ests and lease lines, including all the street surface railroads and real  
 estate owned by it, and including all the railroads and other property  
 mortgaged to your orator by the mortgage or deed of trust  
 157 aforesaid, dated February 1st, 1897, subject, nevertheless, to  
 the lien of said mortgage last mentioned.

Your orator further shows upon information and belief, that  
 on or about the 9th day of November, 1907, the defendant, Morton  
 Trust Company, filed in this court its bill of complaint against the  
 Metropolitan Street Railway Company and other defendants, pray-  
 ing for a foreclosure of the said mortgage dated March 21st, 1902,  
 and praying for the appointment of receivers of the railroads,  
 property, and premises mortgaged and pledged in said last-men-  
 tioned mortgage to the said defendant Morton Trust Company, and  
 of the tolls, earnings, income, rents, issues, and profits thereof, and on  
 or about the 9th day of November, 1907, an order was duly made by  
 this court pursuant to the prayer of said bill of complaint, appoint-  
 ing the defendants, Adrian H. Joline and Douglas Robinson, as  
 receivers of said mortgaged railroads, property, and premises, and  
 of the tolls, earnings, income, rents, issues, and profits thereof.

Twelfth. Your orator further shows on information and belief  
 that on or about the 24th day of September, 1907, the defendants  
 The Pennsylvania Steel Company and The Degnon Contracting Com-



pany, filed a bill of complaint in this court against the defendant, New York City Railway Company, praying for the appointment of receivers of its property. Thereafter the New York City Railway Company filed its answer to said bill admitting the allegation thereof, and thereupon, and on or about September 24th, 1907, by order of this court the above-named defendants Adrian H. Joline and Douglas Robinson, were appointed receivers of said New York City Railway Company and of all of its property, wherever situated, 158 and they were thereby authorized, empowered, and instructed among other things to enter upon and take possession of all such property, and to manage, operate, and control the same. Thereafter the said Adrian H. Joline and Douglas Robinson, appointed receivers as aforesaid, duly qualified as such receivers, and as such receivers entered upon and took possession of the property of said defendant, New York City Railway Company, including the property which is described in the said mortgage dated February 1st, 1897, and conveyed to your orator subject to the trusts thereof, and they have since used and operated the same and are now as such receivers in possession of said property.

Thirteenth. Your orator further shows upon information and belief that thereafter the defendant, Metropolitan Street Railway Company, presented its duly verified petition to this court in the cause last-above mentioned, praying that it might become a party defendant to said suit, and that the receivership under the bill of complaint in the said cause be extended so as expressly to embrace the interests of the Metropolitan Street Railway Company in said property. Thereafter and on October 1st, 1907, by an order of this court the Metropolitan Street Railway Company was made a party defendant to said cause and the receivership in said cause was extended to the properties of the Metropolitan Street Railway Company as prayed in said petition, and the said Adrian H. Joline and Douglas Robinson, theretofore appointed receivers in said cause, were appointed receivers of the properties of the Metropolitan Street Railway Company. Thereafter and on or about October 1st, 1907, as 159 your orator is informed and believes, the said Adrian H. Joline and Douglas Robinson duly qualified as such receivers, and they are now in possession of all the railroads, properties, and franchises of the Metropolitan Street Railway Company described in said mortgage dated February 1st, 1897, and which were conveyed to your orator subject to the trusts thereof.

Fourteenth. Your orator further shows, on information and belief, that the various lines of railway embraced in the said lease of the Metropolitan Street Railway Company to the New York City Railway Company, dated February 14th, 1902, to which reference has hereinbefore been made, as well the lines owned by the Metropolitan Street Railway Company as the lines leased to it, are subject to funded indebtedness secured by mortgage, which is now outstanding, and that failure to meet the interest on such underlying funded indebtedness as such interest matures will operate also as a default

under the several mortgages securing such indebtedness, and will render said mortgages enforceable, and that the total of such funded indebtedness now outstanding secured by mortgages (exclusive of the bonds issued and secured under the aforesaid mortgage to your orator and the aforesaid mortgage to the Morton Trust Company as trustee) amounts to upwards of forty-two million dollars (\$42,000,000) and that the annual interest charges thereunder amount to upwards of two million dollars (\$2,000,000).

Your orator charges that by said lease made by the Metropolitan Street Railway Company to the New York City Railway Company the Metropolitan Street Railway Company parted with the possession of its entire railroad system; that the Metropolitan Street Railway Company has no other resources wherewith to meet the  
160 fixed charges on the mortgage indebtedness of the said system so leased and embraced in the mortgage to your orator, or to meet the accruing rentals of said lines so leased to the Metropolitan Street Railway Company or its predecessors and by the Metropolitan Street Railway Company so leased to the New York City Railway Company and embraced in said mortgage to your orator, or to meet other indebtedness or liabilities of the Metropolitan Street Railway Company than the rentals reserved under said lease made by the Metropolitan Street Railway Company to the New York City Railway Company as part of which said New York City Railway Company agreed to pay such fixed charges and such rentals, and to perform the other covenants therein contained, and that said Metropolitan Street Railway Company is now insolvent and unable to meet its obligations, and by reason of the matters hereinbefore alleged it is and will be unable to perform its covenants and obligations under said mortgage to your orator dated February 1st, 1897.

Your orator further charges that the New York City Railway Company is insolvent and unable to meet its obligations, and that by a decree made by this court on or about October 25th, 1907, in the suit above mentioned of the Pennsylvania Steel Company and the Degnon Contracting Company against the New York City Railway Company, this court did order, adjudge, and decree that the said New York City Railway Company was insolvent, and your orator alleges that the said New York City Railway Company and said receivers thereof have failed and neglected to pay the instalment of rent due and payable by it on October 15th, 1907, under the said lease of the Metropolitan Street Railway Company to the New York City Railway Company.

161 Fifteenth. Your orator further shows, on information and belief, that the properties subject to the lien of the mortgage to your orator dated February 1st, 1897, are inadequate security for the protection of the holders of the bonds issued thereunder and outstanding, and that unless receivers of such mortgaged property be appointed the interest of your orator and of the bondholders it represents will be greatly injured and the value of the security which your orator has for their protection will be further greatly impaired

and diminished, and that it is necessary for the protection of your orator and of the holders of said bonds that a receiver or receivers be appointed in this cause of the railroad property and premises mortgaged and pledged to your orator as aforesaid, and of the tolls, earnings, revenue, rents, issues, profits, and other income thereof.

Sixteenth. Your orator further shows that no proceedings at law or suits in equity have been begun or commenced by your orator, or, as your orator is informed and believes, by any holder of any of the bonds secured by said mortgage dated February 1st, 1897, or of any of the coupons thereto attached, to enforce the payment of the sums so covenanted to be paid by the Metropolitan Street Railway Company under the terms of the said mortgage, and that the amount in controversy in this suit exceeds five thousand dollars.

Seventeenth. The said property mortgaged to your orator as aforesaid is now in the possession of this court through its receivers, and upon application by your orator leave has been granted to your orator to include as defendants herein the said Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company, and the said Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company.

In consideration whereof, and for as much as your orator has no adequate remedy at law, and can have relief only in equity where matters of this kind are properly cognizable and relievable, your orator prays:

(1) That the said defendants may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged, but not under oath, answer under oath being hereby expressly waived.

(2) That an account may be taken of all property subject to the lien of said mortgage dated February 1st, 1897, and that said mortgage may be decreed to be a valid lien upon all and singular the railroads, railroad routes, estates, leaseholds, properties, premises, rights, privileges, and franchises therein described, and upon all the shares of stock mortgaged and pledged to your orator or held by it, subject to the provisions of said mortgage (save and except such property as has been released from the lien thereof as in this bill particularly described), that an account be had of all improvements and additions made since the execution of said mortgage upon and to any of said railroads or property, real and personal, and of any and all horses, cars, carriages, tools, chattels, machinery, motors, engines, and equipment of every description, used or employed upon said railroads or railroad routes, or acquired for use upon or in connection with the same, or of any part thereof, and that said mortgage or deed of trust may be declared to be a valid lien upon all such property, with the tolls, earnings, revenues, rents, issues, profits, and other income thereof, and that the defendant, the Metropolitan Street Railway Company, be directed and commanded to deliver all such property to your orator forthwith upon obtaining possession thereof.

(3) That the rights of your orator and of the bondholders whom it represents may be enforced, and that pending such proceedings a

receiver or receivers be appointed, with the usual powers of receivers in like cases, of the railroads, property, and premises mortgaged and pledged in said mortgage to your orator, dated February 1st, 1897, and of the tolls, earnings, income, rents, issues, and profits thereof, and that such directions may be made with respect to such receivership as may be equitable and proper, and that pending this suit a writ of injunction may be issued out of and under the seal of this honorable court enjoining and restraining the said defendant, Metropolitan Street Railway Company, its officers, directors, and agents, and all other persons whomsoever from interfering with, transferring, selling, or disposing of any of the property of the said Metropolitan Street Railway Company under the control of said receiver or receivers, and from selling, transferring, conveying, or otherwise disposing of or encumbering any of the property, rights, or franchises of the said Metropolitan Street Railway Company.

(4) That the defendants, New York City Railway Company and Adrian H. Joline and Douglas Robinson as receivers of the New York City Railway Company, be directed to account for and from time to time pay over to the receivers to be appointed in this cause the entire net earnings of the street railroads and property in  
164 their possession, which are subject to the lien of the aforesaid mortgage to your orator, dated February 1st, 1897 (not exceeding, however, the rental payable under the aforesaid indenture of lease dated February 14th, 1902, for so long a time as said indenture of lease may continue in force).

(5) That your orator may have such other and further relief in the premises as the nature of the case may require and as may be in accordance with equity.

May it please your honors to grant to your orator a writ or writs of subpoena to be directed to the said defendants, Metropolitan Street Railway Company, Adrian H. Joline and Douglas Robinson as receivers of the Metropolitan Street Railway Company, New York City Railway Company, Adrian H. Joline and Douglas Robinson as receivers of New York City Railway Company, Morton Trust Company, the Pennsylvania Steel Company, and the Degnon Contracting Company, commanding them and each of them at a certain time and under a certain penalty therein to be named, to be and appear before your honors in this honorable court, then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to abide and perform such other and further orders or decrees as to you honors shall seem meet.

GUARANTY TRUST COMPANY OF NEW YORK,  
By J. W. CASTLES, *Prest., Complainant.*

Attest:

E. C. HEBBARD, *Secretary.*  
JULIEN T. DAVIES, *Of Counsel.*

## 165 UNITED STATES OF AMERICA.

*Southern District of New York,**City and County of New York, ss:*

J. W. Castles, being duly sworn, deposes and says he is the president of Guaranty Trust Company of New York, the above-named complainant; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes the same to be true; that the seal affixed to said bill of complaint is the corporate seal of said complainant, and was so affixed by its authority.

J. W. CASTLES.

Sworn to before me this 26th day of February, 1908.

[L. S.]

JAMES D. HURD,

*Notary Public (No. 163), Kings County.*

Certificate filed in New York County.

Commission expires March 30, 1908.

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## Schedule 9.

In the Circuit Court of the United States for the Southern District of  
New York.

THE PENNSYLVANIA STEEL COMPANY AND THE DEGNON  
Contracting Company, complainants,  
*against*

NEW YORK CITY RAILWAY COMPANY, METROPOLITAN  
Street Railway Company et al., defendants.

Eq. No. 2-9.

MORTON TRUST COMPANY, COMPLAINANT,  
*against*

METROPOLITAN STREET RAILWAY COMPANY, NEW YORK  
City Railway Company; Adrian H. Joline and  
Douglas Robinson, as receivers of New York City  
Railway Company; Adrian H. Joline and Douglas  
Robinson, as receivers of Metropolitan Street Rail-  
way Company; the Pennsylvania Steel Company,  
the Degnon Contracting Company et al., defendants.

Eq. No. 2-33.

167 GUARANTY TRUST COMPANY OF NEW YORK,  
complainant,  
*against*

METROPOLITAN STREET RAILWAY COMPANY; ADRIAN H.  
Joline and Douglas Robinson, as receivers of Met-  
ropolitan Street Railway Company; New York  
City Railway Company; Adrian H. Joline and  
Douglas Robinson, as receivers of New York City  
Railway Company; Morton Trust Company; the  
Pennsylvania Steel Company; the Degnon Con-  
tracting Company; and Central Crosstown Rail-  
road Company, et al., defendants.

Eq. No. 2-149.

MORTON TRUST COMPANY, complainant,  
*against*

METROPOLITAN STREET RAILWAY COMPANY; NEW CITY  
 Railway Company; Adrian H. Joline and Douglas  
 Robinson, as receivers of New York City Railway  
 Company; Adrian H. Joline and Douglas Robin-  
 son, as receivers of Metropolitan Street Railway  
 Company; the Pennsylvania Steel Company; the  
 Degnon Contracting Company; the Central Cross-  
 town Railroad Company of New York; and Guar-  
 anty Trust Company of New York, defendants.

Eq. No. 3-37.

168 Now, on this 23rd day of July, 1908, comes Morton Trust  
 Company, trustee under the mortgage of Metropolitan Street  
 Railway Company, dated March 21, 1902, and presents its petition,  
 verified June 12, 1908, praying that the interests of the New York  
 City Railway Company and the interests of the Metropolitan  
 Street Railway Company be represented by independent receivers,  
 and that the receivers of the New York City Railway Com-  
 pany be directed to transfer to the receivers of Metropolitan Street  
 Railway Company all the railroads and premises demised to the New  
 York City Railway Company under the lease of the Metropolitan  
 Street Railway Company to the New York City Railway Company,  
 dated February 14, 1902. Whereupon,

On reading and filing the proof of due service of notice of hearing  
 of said petition on Messrs. Byrne & Cutcheon, solicitors for the  
 Pennsylvania Steel Company and the Degnon Contracting Com-  
 pany; on Messrs. Masten & Nichols, solicitors for Adrian H. Joline  
 and Douglas Robinson, receivers of New York City Railway Com-  
 pany, and for Adrian H. Joline and Douglas Robinson, receivers of  
 Metropolitan Street Railway Company; on James L. Quackenbush,  
 Esq., solicitor for defendant New York City Railway Company; on  
 J. Parker Kirlin, Esq., solicitor for defendant Metropolitan Street  
 Railway Company; on Messrs. Simpson, Thacher & Bartlett, soli-  
 citors for John I. Waterbury et al., as a committee under Metropolitan  
 Street Railway Company stockholders' protective agreement; on  
 Messrs. O'Brien, Boardman & Platt, solicitors for John D. Crim-  
 mins et al., as a committee of contract creditors; on Messrs. Davies,

169 Stone & Auerbach, solicitors for Guaranty Trust Company of  
 New York; and on Messrs. Cravath, Henderson & DeGersdorff,  
 solicitors for Central Crosstown Railroad Company of New  
 York; and due notice having been given to Charles Benner, solicitor  
 for Benjamin S. Catchings, administrator, and Charles Benner et al.,  
 a tort creditors' committee, and on reading and filing said petition  
 and the answer thereto of Guaranty Trust Company of New York,  
 dated June 26, 1908, and after hearing Bronson Winthrop, Esq., of  
 counsel for said Morton Trust Company, in support of said petition,  
 and after hearing Brainard Tolles, Esq., of counsel for Guaranty  
 Trust Company of New York, as trustee, consenting to the relief  
 prayed by said petition, Arthur H. Masten, Esq., of counsel for

Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company, and Adrian H. Joline and Douglas Robinson, as receiver for Metropolitan Street Railway Company, J. Parker Kirlin, Esq., as counsel for Metropolitan Street Railway Company, and Benjamin S. Catchings, Esq., counsel for Charles Benner, Benjamin S. Catchings and Thomas C. McDonald, as a tort creditors' committee, and the court having considered in the disposition of this matter the petition of said Charles Benner, Benjamin S. Catchings, and Thomas C. McDonald, as a tort creditors' committee, verified May 24, 1908, and filed July 14, 1908, and the answers filed in opposition to said tort creditors' petition, and no one appearing in opposition to said petition of Morton Trust Company, and the court being fully advised in the premises, it is ordered, adjudged, and decreed:

170 1. That the prayer of said petition of Morton Trust Company, verified June 24, 1908, be and the same hereby is granted, as indicated herein.

2. That Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company, be and they are hereby directed to surrender at midnight, between July 31, 1908, and August 1, 1908, to Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company, all the railroads, property, and franchises of the Metropolitan Street Railway Company leased and demised under the lease of said Metropolitan Street Railway Company to said New York City Railway Company, dated February 14, 1902, together with all replacements thereof and additions thereto, and all the estate and interest of said New York City Railway Company under said lease, without prejudice, however, to any claim or demands of Metropolitan Street Railway Company or its receivers, against New York City Railway Company or its receivers, under said lease existing at the time of said surrender by reason of the breach of any of the provisions of said lease or otherwise; and that the said Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company, be and they hereby are authorized to accept such surrender and thereupon to run, manage, and operate the said railroads and property, to collect the rents, income, tolls, and profits of the said railroads and property, and to exercise the authority and franchises of said defendant, Metropolitan Street Railway Company, and discharge its public duties, acting in all things subject to the supervision of this court with all the powers and duties heretofore conferred or imposed on them

171 by any order or orders of this court heretofore made in any of the above entitled causes, so far as the same shall be applicable.

3. That Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company, be, and they hereby are, authorized to transfer to Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company, all equipment, material, and supplies, if any, as may be necessary or convenient for



the continued operation of the railroads and property herein directed to be surrendered, and the same shall be accounted for hereafter between the respective receivers under direction of the court upon notice to all parties in interest.

4. That William W. Ladd, Esq., of the city of New York, be, and he is hereby, appointed receiver of all the property of the defendant, New York City Railway Company, real, personal, and mixed, of whatsoever kind and description and wheresoever situated, with all the powers and duties heretofore by any order or orders of this court in any of the above-entitled causes conferred or imposed upon said Adrian H. Joline and Douglas Robinson, as receivers of the New York City Railway Company, so far as the same shall be applicable, acting in all things subject to the supervision of this court, such appointment to take effect at midnight between July 31, 1908, and August 1, 1908.

That the said William W. Ladd file, on or before July 31, 1908, in the office of the clerk of this court, with sufficient sureties, to be approved of by a judge of this court, his bond in the sum of fifty thousand dollars (\$50,000), conditioned that he will well and truly perform the duties of his office and duly account for all moneys  
172 or property which may come into his hand and abide by and perform all things which he shall be directed to do.

5. That Adrian H. Joline and Douglas Robinson, as receivers of New York City Railway Company, be, and they are hereby, directed to transfer, at midnight between July 31, 1908, and August 1, 1908, to said William W. Ladd, herein appointed receiver of the property of New York City Railway Company, all the property of said New York City Railway Company, real, personal, and mixed, of whatsoever kind and description and wheresoever situated, including all claims and choses in action of said New York City Railway Company, and immediately thereafter the said Adrian H. Joline and Douglas Robinson shall cease to be receivers of New York City Railway Company, subject to their duty of accounting as receivers thereof.

7. That Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company, will adopt and affirm all contracts concerned in any way with the operation of the system which were heretofore adopted or entered into by receivers of the New York City Railway Company, and the court reserves the right to impose a lien upon the property itself for any obligations incurred by the court or its officers in its operation, and also for the expenses of all court proceedings in re either company.

9. That any unexpended balance of funds constituting the proceeds of receivers' certificates issued pursuant to authority granted by order of this court dated June 2d, 1908, shall be transferred to the credit of Adrian H. Joline and Douglas Robinson, as receivers  
173 of Metropolitan Street Railway Company, and shall be disbursed by them for the purposes contemplated by said order, and subject in all respects to the provisions thereof.

Nothing herein contained shall affect in any manner the lien of said certificates or the rights of the parties in interest in respect thereto.

10. That all claims and demands between New York City Railway Company or its receivers on the one hand, and Metropolitan Street Railway Company or its receivers on the other hand, are hereby reserved for an accounting to be had hereafter between said persons.

11. That any party in interest may apply for further direction.

Dated New York, July 24th, 1908.

E. HENRY LACOMBE,

*U. S. C. J.*

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Schedule 10.

In the Circuit Court of the United States for the Southern District of New York.

GUARANTY TRUST COMPANY OF NEW YORK, COMPLAINANT,  
*against*

METROPOLITAN STREET RAILWAY COMPANY; ADRIAN H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company; New York City Railway Company; William W. Ladd, as receiver of New York City Railway Company; John D. Crimmins, Samuel A. Megrath, and Daniel M. Brady, as a committee of contract creditors of New York City Railway Company; Charles Benner, Benjamin S. Catchings, and Thomas C. McDonald, as a committee of tort creditors of New York City Railway Company; Morton Trust Company; the Pennsylvania Steel Company; the Degnon Contracting Company; Central

175 Crosstown Railroad Company; Central Park North and East River Railroad Company; Arthur J. Nathan; Winfred Carlos; Leon B. Ginsburg; Charles Olsen; American Surety Company of New York; Emma A. Dambmann; George Werner; Joseph M. Goodman; Maria Keim; Walter C. W. Auferman; Fred Hulberg; Samuel Angelo; Frank G. McCort; Louis Lurie; Agnes O'Bryan; Thomas Carney; Henry Miller; John Solomon; Irene Melins; Morris Bernstein; William J. Gould; Jacob Green; Catherine Unsworth; Thomas H. Fennell; Augusta Gunther; Catherine Overin; Daniel Darby; Cornelius O'Keefe; William T. Campbell, as administrator of the goods, etc., of John Campbell, deceased; Wolf Schussler; and Vulcanite Portland Cement Company, defendants.

In equity.

On reading and filing the mandate of the United States Circuit Court of Appeals for the Second Circuit in this cause, bearing date the 21st day of March, A. D. 1910, and in obedience to said man-

date and in cognizance of the opinion and order of the said  
 176 United States Circuit Court of Appeals herein, it appearing  
 that due notice of the settlement of this decree has been given,  
 it is now ordered, adjudged, and decreed as follows:

## I.

That the mortgage made by the defendant Metropolitan Street Railway Company, to the Guaranty Trust Company of New York, as trustee, bearing date the 1st day of February, 1897, is a valid and subsisting mortgage constituting a lien upon a substantial part of the property of the Metropolitan Street Railway Company, being the property described in and directed to be sold by the fourth paragraph or subdivision of this decree:

That bonds to the amount of twelve million five hundred thousand dollars (\$12,500,000) were duly certified and issued under said mortgage and are now outstanding:

That default has been made in the payment of the interest coupons on said bonds falling due on the 1st day of February, 1908, and also in the payment of the interest coupons on said bonds falling due on the 1st day of August, 1908:

That default has been made in the payment of the principal of said bonds and of the accrued interest thereon from August 1, 1908, to December 1, 1908, which principal and accrued interest became due December 1, 1908, by the election in writing of a majority in interest of the holders of said bonds, pursuant to article third of said mortgage:

That default has been made in the payment of certain rentals upon lines the leases of which are covered by the mortgage to the complainant:

That the amount of the principal of said bonds and the amount due on said coupons, with interest on the above amounts to  
 177 March 18, 1909, is thirteen million five hundred and eighty-nine thousand two hundred and seventy and 83/100 dollars (\$13,589,270.83).

## II.

That under an order made and filed herein on June 2d, 1908, receivers' certificates to the amount of three million five hundred thousand dollars (\$3,500,000) of principal, dated the 15th day of June, 1908, and payable one year from date, bearing interest at the rate of 5% per annum, payable semiannually, were duly issued, and that the same were retired by means of a new series of receivers' certificates of like amount, dated June 15th, 1909, payable one year from date, bearing interest at  $4\frac{1}{2}\%$  per annum, payable semiannually, issued under an order of this court, dated June 8th, 1909, which are now outstanding and unpaid, and that said receivers' certificates are

secured by a lien upon all the property of the Metropolitan Street Railway Company prior to the lien of the said mortgage to the complainant and by a lien upon the property of the New York City Railway Company. Certain of the defendants claim that resort should be had to the property of the Metropolitan Street Railway Company subject to the mortgage to the complainant and to the mortgage to the Morton Trust Company hereinafter referred to, before resort is had to any other property for the payment of such certificates. And it is hereby

Ordered, adjudged, and decreed that the principal and interest of said receivers' certificates and of all others hereafter issued in place and in lieu thereof, except to the extent that such certificates may be paid by the receivers under the order of the court, be in the first instance paid out of the proceeds of sale hereby directed  
178 to be made, but with the rights and privileges of claiming exoneration, contribution, or repayment or other equitable relief more specifically conferred by the seventh article hereof.

### III.

That the defendant, Metropolitan Street Railway Company, is hereby required within twenty (20) days after the service of notice of entry of this decree to pay to the clerk of this court, subject to the further order of the court herein, the amount above found due, to wit, the sum of thirteen million five hundred and eighty-nine thousand two hundred and seventy and 83/100 dollars (\$13,589,270.83), with interest thereon at the rate of six per cent per annum from March 18th, 1909, together with the clerk's fees for receiving and disbursing said sum of money.

Upon payment of said sum and upon giving an undertaking without sureties to pay such sums as said defendant may hereafter be directed to pay by decree in this cause on account of debts and obligations of the receivership and compensation of the receivers and their counsel and on account of allowances to the parties in this cause and their solicitors and counsel and such other sums as are hereby or may be hereafter in this cause adjudged to be entitled to priority of payment over the aforesaid mortgage to the complainant, all interest upon the above-mentioned bonds and coupons shall cease, and this defendant, the Metropolitan Street Railway Company, shall be relieved of the operation of the decree of sale herein contained.

Any undertaking which may be given by the Metropolitan Street Railway Company for the purpose above set forth shall be secured by a lien upon all the property of the said defendant then in  
179 the custody of this court, which is hereinafter directed to be sold, and a lien to that extent is hereby charged upon said property, and the Metropolitan Street Railway Company shall from time to time execute, acknowledge, and record such instrument or

instruments as the court shall direct to give effect to said lien. The Metropolitan Street Railway Company, or any person entitled to exercise a right of redemption on its behalf, may apply to this court at any time within said period of twenty days for an order requiring the complainant or the receivers or any other person holding any fund which in equity should be applied in whole or in part to the purpose of such redemption, to pay the same, or such part thereof as may be equitable, to the clerk of this court.

#### IV.

That unless the defendant The Metropolitan Street Railway Company shall be relieved as aforesaid from the operation of the decree of sale herein contained, the special master hereinafter appointed is hereby authorized and directed to sell at public auction to the highest bidder, in conformity with the directions in that behalf in this decree more particularly set forth, all and singular the property, estate, rights, franchises, contracts, and privileges (choses in action and effects of the defendant Metropolitan Street Railway Company, which at the time of such sale are subject to the lien of the aforesaid mortgage to the complainant, including all the property hereinafter specifically described and directed to be sold, together with all the horses, cars, carriages, tools, chattels, machinery, motors, engines, and equipment of every description then used or acquired for use upon or in connection with the several lines or routes of railway (including leased lines actually operated by the receivers), hereinafter described and directed to be sold, with the exception of special work hereinafter more particularly described. The property so directed to be sold shall include particularly the following parcels:

(1) All the railways, properties, and franchises formerly of the following-named companies, with any and all additions thereto and extensions thereof which were constructed and in operation on the 14th day of June, 1897, and all real and personal property formerly of said companies, except such as is included in parcels (2) to (24), both inclusive, mentioned in this paragraph of the decree, namely:

The Houston, West Street, and Pavonia Ferry Railroad Company.

The Chambers Street and Grand Street Ferry Railroad Company.

The Broadway Railway Company.

The South Ferry Railroad Company.

The Metropolitan Crosstown Railway Company.

The Lexington Avenue and Pavonia Ferry Railroad Company.

The Columbus and Ninth Avenue Railroad Company.

The line of railway known as the Fort Lee Ferry extension described in said mortgage to the complainant.

All the rights which the Metropolitan Street Railway Company had on the 14th day of June, 1897, for the operation of its cars upon

the tracks or routes of other street railway companies or of other persons or corporations in connection with the railways, routes, and franchises above specifically mentioned, excluding any and all rights existing under and by virtue of the several leases hereinafter referred to and particularly including its rights under the trackage agreement dated the 21st day of December, 1896, between the Thirty-fourth Street Crosstown Railway Company, the Metropolitan Street Railway Company, and others; together with all claims, demands, and rights of action whatsoever of the Metropolitan Street Railway Company or its receivers against the above-named Thirty-fourth Street Crosstown Railway Company, arising out of or connected with the subject matter of the aforesaid trackage agreements.

The special master hereinafter appointed is directed to make a list showing with as great particularity as he may deem practicable all the railways, rights, and franchises aforesaid, with the additions thereto and the extensions thereof and the trackage rights and operating agreements above referred to, showing their location in the several streets and other places of the city of New York, the length of the line on each street or portion of a street traversed by said railways, routes, or trackage rights, and the character of the track, whether single track or double track, and whether adapted to electric or horse operation; and said list shall be filed with the special master for public inspection prior to the sale. The said list is advisory only and shall not be construed to be a warranty of title, and the purchaser or purchasers at the sale shall be entitled only to such title or interest as the special master has power to transfer by virtue of this decree.

The purchaser of the railways, properties, and franchises of the Houston, West Street and Pavonia Ferry Railroad Company shall be entitled to receive as an additional muniment of title, without merger, the first mortgage bonds of said company, to the amount of \$500,000 of principal, now held by the complainant as trustee.

182 (Paragraphs (2) to (37), both inclusive, enumerate and describe the railroads, real estate contracts, etc., described and included in certain leases owned by the Metropolitan Street Railway Company, and enumerate and describe certain parcels of land, with the buildings and improvements thereon, situate in the Borough of Manhattan, city of New York, together with the tools, chattels, machinery, motors, engines, and equipment of every description located upon the said premises or generally kept or used in connection therewith for any purpose connected with the maintenance or operation of the said railways, which at the time of sale shall continue to be in the possession of or under the control of the said receivers, including all cables, horses, cars, chattels, machinery, etc., and the appurtenances, and certain shares of stock of other railroad companies and all other property and franchises of every nature and description not particularly described or referred to, which on June 14, 1897, be-

longed to the Metropolitan Street Railway Company, or in or to which it then had any estate, right, title, interest, claim, or demand whatsoever, and not subsequently released from the lien of the mortgage.)

The following special work not to be sold:

Fifteenth Street and Eleventh Avenue yard: Second Ave. and 42d Street, crossing with yokes; Second Ave., north of Stuyvesant St., right-hand crossover; Third Ave., 5th Street car house, old turnout.

141st Street and Lenox Avenue yard: Third Ave., 129th St. car house, turnout and yokes; Broadway and Manhattan Street, crossing and turnout.

183 152nd Street and Eighth Avenue yard: 125th Street, west of Eighth Ave., left-hand crossover; Amsterdam Ave. and 161st Street, crossover; Amsterdam Ave. and 162d Street, branch-off.

Second Ave. and 125th Street: Crossing with yokes; Second Ave. and 110th Street, old crossing.

Fourth Street and East River yard: Avenue A and 92d Street, right-hand crossover.

Post-office loop: Old switches and mates.

## V.

That an inventory shall be prepared by the special master and by him filed with the clerk of this court when and as directed by this court. This inventory will enumerate the rolling stock of the road in the possession of the receivers, stating the type and character of each item and giving its number. This inventory will also state the number and location of the various dynamos, transformers, and converters and the number of horses. The inventory shall include such other articles of personal property in the possession of the receivers as in their opinion are of a value in excess of one hundred dollars each, and such additional articles as the special master shall think it wise to include, except that such inventory shall not include the special work hereinbefore described, which is not to be sold under the terms of this decree. Such inventory and valuation shall be

advisory only and shall not, with respect to value or title or  
184 any other matter, be construed as a warranty, but all purchases shall be deemed to be made in reliance upon the purchaser's own knowledge or information as to the property purchased.

The property, both real and personal, hereby directed to be sold may be inspected by intending bidders at the sale hereunder, subject to such reasonable regulations as the receivers may prescribe.

## VI.

That any purchaser of the property of the Metropolitan Street Railway Company at the sale hereby decreed may satisfy and make



good the balance of his bid, above the sum required to be paid in cash in whole or in part, by delivering to the special master appointed to conduct such sale, bonds duly certified under the mortgage mentioned in Paragraph I of this decree, or coupons thereto appertaining, or receivers' certificates mentioned in Paragraph II of this decree, which securities, unless in negotiable form and payable to bearer, shall be duly endorsed or signed in blank. Such bonds, coupons, or receivers' certificates, whether delivered to the said special master at the time of sale or subsequently, shall be received at such price or value as shall be equivalent to the sum which would be payable out of the net proceeds of such sale, if made for money, to the holder or holders of said bonds, coupons, or receivers' certificates, for his or their just share or proportion in that character of such net proceeds, upon a due accounting and apportionment and distribution of such net proceeds. If there shall be realized on the sale and applied on the purchase price the entire amount due upon said bonds, coupons, or receivers' certificates, then and in that case the said bonds, coupons,

and receivers' certificates, or such of them as are so paid in full, 185 shall be cancelled and retained by the special master, provided that when all said bonds and coupons issued under and secured by said mortgage and remaining unpaid, shall be cancelled and held by the special master, he may deliver them to the trustee of the mortgage securing the same, upon receiving a satisfaction thereof.

But if said entire amounts are not realized on the sale and applied upon the purchase price the special master shall stamp or write upon each bond, coupon, or certificate the amount which is so applied, and also the amount of the deficiency remaining after such application, and shall return such bonds, coupons, and certificates to the purchaser or purchasers from whom the same were received.

## VII.

That the fund arising from the sale of the properties above directed to be sold be applied as follows, namely:

(1) To the payment of the costs of this cause and of all proper expenses attendant upon said sale or sales, including the compensation of the special master appointed to make the sale, and to the payment also of all charges, compensations, allowances, and disbursements of the complainant as trustee and its solicitors and counsel to the extent that said expenses, charges, compensations, allowances, and disbursements shall be allowed by this court, and shall not be payable out of other funds pertaining to said trust.

(2) To the payment of the principal and interest of the receivers' certificates hereinbefore specifically described in the second article hereof, except as in said article provided, but such payment having been made in the first instance out of the fund produced by the sale herein directed; it is

186 Further ordered, adjudged, and decreed that this court reserves power and jurisdiction to entertain an application or applications on the part of any person or persons interested in the funds referred to in this article of the decree to enforce against any party to this cause or against any fund or property of the Metropolitan Street Railway Company or the New York City Railway Company now in the possession of this court or hereafter to come into such possession, contribution towards such payment or exoneration from all or any portion of such payment or otherwise to obtain the reimbursement to the fund produced by the sale herein directed from any such party or any such fund or property of any sum or sums of money which ought lawfully and equitably to be applied to the partial or entire discharge and payment of said receivers' certificates and the interest accrued thereon.

It is further ordered, adjudged, and decreed

(3) That the balance of the fund arising from the sale of the properties hereinabove described and by this decree directed to be sold, shall be distributed, together with the proceeds of the sale of all the remaining property of the Metropolitan Street Railway Company, and the property of the New York City Railway Company now in the possession of the court or hereafter to come into such possession, including any balance of the funds in the possession of the receivers of either or both of said companies which may be available for such distribution among all creditors, claimants and persons interested therein, including the officers of this court, their counsel and the counsel of all parties interested in the said fund, proceeds and  
187 property for distribution, or any part thereof, in accordance with their respective rights and priorities to be hereafter determined by the court, upon such notice to the respective parties in interest as the court may direct.

#### VIII.

That the property hereby directed to be sold shall be sold subject to all taxes and assessments and to the lien of any receivers' certificates that may have been or may be issued for the purpose of extinguishing the lien of any such taxes and assessments and to liens prior to the aforesaid mortgage to the complainant, existing in favor of any person or persons, corporation or corporations, not a party to this cause; except such liens as are herein specifically directed to be paid out of the proceeds of sale, or which are reserved for future adjudication under subdivision 3 of article seven hereof.

#### IX.

That it shall be a condition of sale of the lines of railway, leasehold estates, and parcels of land separately enumerated and directed

to be sold by article four of this decree that the purchaser shall, as a part of the consideration for such sale and in addition to the price bid, assume all pending uncompleted and not fully executed contracts in respect to the property of the Metropolitan Street Railway Company, whether leasehold or otherwise, theretofore made by the receivers of the New York City Railway Company or the receivers of the Metropolitan Street Railway Company for the operation, maintenance and betterment of the railway system operated by said receivers as a going concern; and shall also assume liability for

188 all claims in tort, whether in suit or presented or not, arising during the period of operation of said railway system by receivers appointed by this court, which shall not have been paid and discharged by said receivers at the time of said sale. In the event that said purchaser or purchasers shall refuse after demands made to perform any such contract or discharge any such indebtedness, obligation or liability, the person or persons holding the claim therefor may upon fifteen days' notice to said purchaser or purchasers, their successor or successors, assign or assigns, file his or their petition in this court to have such claim enforced against the property aforesaid in accordance with the usual practice of this court; and such purchaser or purchasers, and his or their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt, or demand so sought to be enforced, and either party shall have the right to appeal from any judgment, decree, or order made thereon.

Jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree; and the court reserves the right to retake and resell said property in case the purchaser or purchasers, his or their successors or assigns, shall fail to comply with any order of the court in respect to the performance of such contract or the payment of such indebtedness, obligation, or liability within thirty days after service of a certified copy of such order. No purchaser shall be held personally liable under this article of the decree for any unpaid indebtedness of the receivers or for any work done or materials furnished under any unfinished contract except such as shall have been done or furnished after the delivery of possession of the property sold to such purchaser and with his

189 consent. Subject to that exception, the method herein provided for enforcing the liability of the purchaser for the unpaid indebtedness and other obligations of the receivers or for their unfinished contracts, shall be exclusive of all other remedies.

Said receivers shall, prior to the sale hereunder and as soon as practicable, file with the clerk of this court and with the special master a statement in such detail as they shall find practicable showing the principal items of indebtedness, obligations, and liabilities contracted or incurred by them remaining unpaid, under all pending, uncompleted, and not fully executed contracts, and a list of the chief

contracts to be assumed by the purchaser hereunder, and shall within two weeks prior to the time of sale file with the clerk of this court and the special master a further statement showing as definitely as they shall find practicable any additional indebtedness, obligations, or liabilities contracted and incurred and outstanding, and also the amount of the indebtedness, obligations, and liabilities included in such first statement which may have been discharged; but such statement shall be advisory only and shall in no wise constitute a warranty nor shall such statement constitute ground for a release from any bid because of any representation therein or omission therefrom.

## X.

That all the property directed by this decree to be sold shall be sold by William L. Turner, Esq., who is hereby appointed special master for that purpose, at such date as may be fixed by the court and at an hour to be fixed by him, at the north main entrance of the county courthouse of the county of New York, in the city of New York, with power to adjourn said sale at any stage of the proceedings to any room in said courthouse which he may be permitted to use by the authorities having the custody thereof, and with power to adjourn said sale from time to time to a future day by oral announcement at the time appointed for the sale, upon consent of the solicitors for the complainant or with the approval of the court, without prejudice to the notice of sale and without the necessity of publishing any further notice; but the special master may, notwithstanding, give such notice of any such adjournment by publication or otherwise as he shall think fit.

The special master shall give notice of such sale by publication once a week for not less than four consecutive weeks in one newspaper of general circulation printed and published in the city and county of New York, which notice shall contain a brief general description of the property to be sold, a statement of the time and place of the sale, and a reference to this decree for a more particular description of such property, and a statement of the terms and conditions of sale. The special master shall give such further notice of such sale by publication or otherwise as he shall think fit. Any party to this cause, or any holder of any of the bonds, coupons, or receivers' certificates herein mentioned may purchase at such sale and may hold the property purchased in his, its, or their own right, free from any trust or right of redemption.

## XI.

That the special master shall invite bids upon all the property directed to be sold by this decree in one parcel as an entirety, including the interest therein of all parties to the cause, except such

191 interest and right of resale as is expressly reserved by Article IX of this decree, and shall provisionally accept the bid of the highest qualified bidder on said entire property, provided that said bid shall not be less than ten million dollars in cash.

The special master shall report the bid so provisionally accepted to the court.

## XII.

That unless the court shall otherwise direct, for just cause shown, upon the petition of any person desiring to bid at such sale, no bids shall be received from any bidder for the entire property hereby directed to be sold who shall not first deposit with the special master the sum of \$100,000, either in cash or in a check certified by a national or State bank or trust company situate in the city of New York.

The cash or check deposited by any bidder in order to qualify him to bid at the sale shall be held as a pledge that such bidder will make good his bid if accepted by the court. The cash or checks so deposited, except those deposited by any bidder whose bid shall be provisionally accepted, shall be returned by the special master at the conclusion of the sale to the bidder or bidders from whom they were received. The cash or checks so deposited by any bidder or bidders whose bid shall be provisionally accepted as provided in this decree shall be returned by the special master to the bidder or bidders from whom they were received if such provisional acceptance shall thereafter not be confirmed by the court.

The cash or check deposited by any bidder in order to qualify him to bid at the sale shall be forfeited and applied to the expenses of said sale and of the receivership of the property of Metropolitan Street Railway Company in the event that the said bidder shall not make good his bid.

192 In the event that any successful bidder shall fail to make good his bid as the court shall direct upon confirmation to him of such sale, the court may order a resale of the property covered by such bid, and the said bidder shall be liable for all the expenses thereof and for any deficiency of price realized thereon.

## XIII.

That in addition to the cash deposited upon any bid at the time of said sale as hereinbefore required, which shall be received as a part of the purchase price, there shall also be paid in cash by the purchaser upon the confirmation of such sale, and from time to time thereafter such further portions of the purchase price of said property as the court may direct.

All sums of money received upon any such sale shall be deposited by the special master in the Guaranty Trust Company of New York.

The court reserves the right to reject any bid and to retake and resell the property purchased upon the failure of any purchaser to

comply with the terms of sale or with any order of the court requiring payment within thirty days after service upon such purchaser of a certified copy of such order.

#### XIV.

That the enumeration in this decree or in the inventory hereby directed to be prepared of any lease, or traffic or trackage or operating agreement, or other executory contract, to which the Metropolitan Street Railway Company, or any of its constituent companies, is a party, or by which it may in any manner be bound, shall not be deemed to constitute an adoption of such lease, agreement, or  
193 contract by the court or by the receivers, and the court reserves the right, notwithstanding this decree or any sale hereunder, from time to time to direct the receivers whether or not to adopt any such lease, agreement, or contract. At any time after confirmation of the sale and before delivery of possession to the purchaser of the property affected by any such lease, agreement, or contract the court will direct the receivers to take such action in respect to the adoption or nonadoption of any such lease, agreement, or contract as may be requested by the accepted bidder for the same or the property affected thereby upon receiving such indemnity as the court shall deem necessary for the protection of the receivers.

Any purchaser or purchasers of the entire property directed to be sold by this decree shall be allowed one year from the date of confirmation within which to elect to adopt and continue in force, or to refuse to adopt, any lease, traffic or trackage or operating agreement, or other executory contract, which may be included in the property sold or may constitute an incident or appurtenance thereof.

Such election shall be made by an instrument in writing subscribed by such purchaser or purchasers, and filed in the office of the clerk of this court, and no conduct or user of rights by any purchaser or purchasers, within such period of one year, unaccompanied by the filing of such written instruments, shall be deemed to conclude the purchaser or purchasers in respect of such election. In the event of the failure by such purchaser or purchasers to file a statement of election to refuse to adopt any such contract within the period of one year above allowed, he or they shall be deemed to have elected to adopt such contract, and to accept the same as part of the property purchased.

194 In the event that such purchaser or purchasers shall elect not to adopt any such lease, traffic or trackage or operating agreement or other executory contract, he shall reassign and retransfer all his right, title, and interest in the same to the Metropolitan Street Railway Company or its receivers or assigns without deduction, however, from the sum paid or payable by him on ac-

count of his purchase thereof. Pending such election by such purchaser or purchasers, Metropolitan Street Railway Company or its receivers or assigns shall have the right to make any payments which may be necessary to be made in order to preserve the rights acquired under such lease, traffic or trackage or operating agreement or other executory contract, and any such payment so made by Metropolitan Street Railway Company, its receivers or assigns, shall be repaid to Metropolitan Street Railway Company, its receivers or assigns, by the said purchaser or purchasers, and such repayment shall be enforceable against said purchaser in the manner specified in Paragraph IX hereof. The court reserves power to direct the payment by the purchaser or by the receivers of such amounts as shall be found to be equitable upon an accounting or otherwise in respect to any lease, traffic or trackage or operating agreement which the purchaser hereunder shall elect not to adopt or which he shall require the receivers to elect not to adopt, and jurisdiction over the property hereby directed to be sold is reserved to enforce such payment.

#### XV.

That the court reserves the exclusive power and jurisdiction to deliver to the purchaser or purchasers title to and possession of the property hereby directed to be sold, and to determine any  
 195 and all controversies as to the character, extent, and validity of the possession of such purchaser or purchasers acquired through the execution of this decree.

The special master shall put the purchaser in possession and the purchaser shall take possession of the property sold under this decree within sixty days after the date of entry of the decree confirming said sale, but the court reserves the right upon good cause shown to postpone the date of such delivery of possession.

#### XVI.

That upon confirmation of the sale hereinbefore ordered and upon compliance with the terms of sale by the purchaser or purchasers of the property of the Metropolitan Street Railway Company, above directed to be sold, the special master is hereby authorized and required to make, execute, and deliver to such purchaser or purchasers or his or their assigns a proper instrument or instruments of conveyance, assignment, and transfer of the properties so sold, in which instrument or instruments the receivers of the Metropolitan Street Railway Company shall join, and upon the request of the purchaser or purchasers, and upon the execution of such instrument of conveyance, assignment, and transfer, the Metropolitan Street Railway Company and each and every person holding the record title to any



part of the property herein described or directed to be sold for the account of the Metropolitan Street Railway Company, shall execute and deliver to such purchaser or purchasers all such instruments of transfer, assignment, or further assurance as shall be necessary to establish and perfect the title of such purchaser or purchasers to the property so sold.

196. The purchaser or purchasers receiving such instrument or instruments of conveyance, assignment, or transfer from the special master shall be invested with and shall hold possession of and enjoy the said property, and all the rights and franchises appertaining thereto, subject to the provisions of this decree, as fully and completely as the Metropolitan Street Railway Company or its receivers now hold or enjoy and has heretofore held and enjoyed the same. And further, that the said purchaser or purchasers shall have and be entitled to hold the said properties so sold, freed, and discharged of and from the lien of the mortgage mentioned in Paragraph I of this decree and of and from any lien arising out of any order of the court or action of the receivers herein, except as otherwise herein specifically provided, and from any and all title, interest, or claim of said Metropolitan Street Railway Company, its stockholders, creditors, and receivers, and of any and all parties to this cause, and any and all persons claiming by, through, or under them or any of them.

#### XVII.

That the court reserves power to enter a decree pro confesso against the defendants, Vulcanite Portland Cement Company, Samuel Angelo, Cornelius O'Keefe, Winifred Carlos, and Charles Olsen, at any time after the expiration of thirty days from and after March 8th, 1909, and to enter a decree pro confesso against the defendant, American Surety Company of New York, at any time after the expiration of thirty days from and after March 11th, 1909.

#### XVIII.

197 That the court reserves for further determination all matters of equity not herein expressly adjudged, and any party to this cause or other claimant contemplated in this decree may apply for further order and direction touching the matters in issue undisposed of by this decree. The October, 1908, equity term of this court is extended until after the complete execution of the provisions of this decree and until after the final disposition of all matters herein reserved for future determination or action by this court.

Dated April 6th, 1910.

E. HENRY LACOMBE,  
*United States Circuit Judge.*

In the Circuit Court of the United States for the Southern District  
of New York.

THE FARMERS' LOAN AND TRUST COMPANY, AS  
trustee, successor of Morton Trust Com-  
pany, as trustee, complainant,  
*against*

METROPOLITAN STREET RAILWAY COMPANY,  
Adrian H. Joline and Douglas Robinson, as  
receivers of Metropolitan Street Railway  
Company; New York City Railway Com-  
pany, William W. Ladd, as receiver of New  
York City Railway Company; the Pennsyl-  
vania Steel Company, the Degnon Contract-  
ing Company, the Central Crosstown Rail-  
road Company of New York, Guaranty  
Trust Company of New York, John I.  
Waterbury, Edmund C. Converse, and  
Harry S. Hopper, as a committee represent-  
ing stockholders of Metropolitan Street Rail-  
way Company; John D. Crimmins, Samuel  
A. Megeath, and Daniel M. Brady,

199 as a committee of contract creditors  
of New York City Railway Com-  
pany; Charles Benner, Benjamin S. Catch-  
ings, and Thomas C. McDonald, as a  
committee of tort creditors of New York  
City Railway Company; and Arthur J.  
Nathan, Winifred Carlos, Jane Hart, Leon  
B. Ginsburg, Charles Olsen, Emma A.  
Dambmann, George Werner, Joseph M.  
Goodman, Maria Keim, Walter C. W.  
Auferman, Fred Hulberg, Samuel Angelo,  
Frank G. McCort, Louis Lurie, Agnes  
O'Bryan, Thomas Carney, Henry Miller,  
John Solomon, Irene Melius, Morris  
Bernstein, William J. Gould, Jacob Green,  
Catherine Unsworth, Thomas H. Fennell,  
Augusta Gunther, Catherine Overin, Daniel  
Darby, Cornelius O'Keefe, William T.  
Campbell, as administrator of the goods,  
etc., of John Campbell, deceased, Wolf  
Schussler, American Surety Company of  
New York, and Vulcanite Portland Cement  
Company, defendants.

In equity. No. 3-37.

filed herein January 26th, 1909, and upon the exhibits to said amended and supplemental bill, and upon the answers of the respective defendants thereto, and upon the stipulations made and entered into between the complainant and the several defendants relative to service of said amended and supplemental bill of complaint, and to the joinder of issue under said amended and supplemental bill, and upon the order of this court, made on the 16th day of May, 1910, in pursuance of such stipulations, and upon the orders for decree pro confesso entered on the 9th day of May, 1910, against the defendant, the Central Crosstown Railroad Company of New York, and on the 14th day of May, 1910, against the defendant William T. Campbell, as administrator of the goods, etc., of John Campbell, deceased, and on May 16th, 1910, against the defendant Samuel Angelo, and upon the testimony taken in open court in this cause on the 9th and 18th days of February, 1909, and upon the 4th, 9th, 15th, 17th, 22nd, 25th, and 29th days of March, 1909, and upon the 2nd, 6th, 13th, 15th, 20th, and 23rd days of April, 1909, and upon the 12th, 20th, and 26th days of April, 1910, and upon the 17th day of May, 1910, and upon the exhibits and other proofs and the several orders, papers, and proceedings in this cause, and the same was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged, and decreed as follows:

# I.

That the mortgage made by the defendant Metropolitan Street Railway Company to Morton Trust Company as trustee, dated March 21st, 1902, is a valid and subsisting mortgage constituting a lien upon all the property of the Metropolitan Street Railway Company which is directed to be sold by Article IV of this decree and which is designated in said article as lots one to twelve, both inclusive.

That Morton Trust Company, trustee under the aforesaid mortgage dated March 21, 1902, was on or about January 26, 1910, merged in Guaranty Trust Company of New York, which company thereafter resigned as trustee under and from the trusts created by said mortgage dated March 21, 1902, and the Farmers' Loan and Trust Company, complainant in this suit, was duly substituted and appointed trustee under said mortgage dated March 21, 1902, in the place and stead of said Guaranty Trust Company of New York, in accordance with and pursuant to the terms and provisions of said mortgage dated March 21, 1902. That said The Farmers' Loan and Trust Company duly accepted its appointment as such trustee by instrument in writing, and, pursuant to the terms and provisions of said mortgage, thereupon became vested with all the estates, properties, rights, powers, and trusts of its predecessors in the trust under said mortgage with like effect as if originally named as trustee therein. That thereupon, by order of this court filed May 27th, 1910, this cause, which was begun by Morton Trust Company as complain-

ant, was duly continued in the name of the Farmers' Loan and Trust Company as trustee, successor of Morton Trust Company as trustee, as complainant in the place of Morton Trust Company.

That bonds bearing interest at the rate of four per cent per annum were duly certified and issued under said mortgage to the amount of sixteen million six hundred and four thousand dollars (\$16,604,000), and are now outstanding;

202 That default has been made in the payment of the interest on said bonds falling due on the 1st day of April, 1908, and also in the payment of the interest on said bonds falling due on the 1st day of October, 1908;

That default has been made in the payment of the principal of said bonds and of the accrued interest thereon from October 1st, 1908, to January 7th, 1909, which principal and interest became due upon January 7th, 1909, by declaration of said Morton Trust Company as trustee, made in accordance with the provisions of article sixth of said mortgage;

That default has been made in the payment of certain rentals upon railroad properties, the leases of which are covered by the said mortgage made to Morton Trust Company.

That the amount of the principal of said bonds and the amount due for said accrued interest with interest on the above amounts to May 31st, 1910, is eighteen million nine hundred and thirty-one thousand two hundred and sixty dollars and ninety cents (\$18,931,260.90).

## II.

That under an order made and filed herein on June 2d, 1908, receivers' certificates to the amount of three million five hundred thousand dollars (\$3,500,000) of principal, dated the 15th day of June, 1908, and payable one year from date, bearing interest at the rate of 5% per annum, payable semiannually, were duly issued and that the same were retired by means of a new series of receivers' certificates of like amount, dated June 15th, 1909, payable one year from date, bearing interest at 4½% per annum, payable semiannually, issued under an order of this court, dated June 8th, 1909, which are now out-  
203 standing and unpaid, and that said receivers' certificates are secured by a lien upon all the property of the Metropolitan Street Railway Company prior to the lien of the said mortgage made to Morton Trust Company and by a lien upon the property of the New York City Railway Company.

## III.

That the defendant Metropolitan Street Railway Company is hereby required within twenty (20) days after the service of notice of entry of this decree to pay to the clerk of this court, subject to the further order of the court herein, the amount above found due, to wit, the sum of eighteen million nine hundred and thirty-one thousand

two hundred and sixty dollars and ninety cents (\$18,931,260.90), with interest thereon at the rate of 6% per annum from May 31st, 1910, together with the clerk's fees for receiving and disbursing said sum of money.

Upon payment of said sum and upon giving an undertaking without sureties to pay such sums as said defendant may hereafter be directed to pay by decree in this cause on account of debts and obligations of the receivership and compensation of the receivers and their counsel, and on account of allowances to the parties in this cause and their solicitors and counsel and such other sums as are hereby or may hereafter in this cause adjudged to be entitled to priority of payment over the aforesaid mortgage made to Morton Trust Company, all interest upon the above mentioned bonds and coupons shall cease and the defendant Metropolitan Street Railway Company shall be relieved from the operation of the decree of sale herein contained.

Any undertaking which may be given by the Metropolitan  
204 Street Railway Company for the purpose above set forth shall be secured by a lien upon all the property of the said defendant and then in the custody of this court and which is covered by the mortgage made to the Morton Trust Company, hereinbefore referred to, and a lien to that extent is hereby charged upon said property, and the Metropolitan Street Railway Company shall from time to time execute, acknowledge, and record such instrument or instruments as the court shall direct to give effect to said lien.

The Metropolitan Street Railway Company, or any person entitled to exercise a right of redemption on its behalf, may apply to this court at any time within said period of twenty (20) days for an order requiring the complainant or the receivers or any other person holding any fund which in equity should be applied in whole or in part to the purpose of such redemption, to pay the same, or such part thereof as may be equitable, to the clerk of this court.

#### IV.

That unless the defendant, the Metropolitan Street Railway Company, shall be relieved as aforesaid from the operation of the decree of sale herein contained, the special master hereinafter appointed is hereby authorized and directed to sell at public auction to the highest bidder, in conformity with the directions in that behalf in this decree hereinafter more particularly set forth, all and singular the railroads, railroad routes, estates, leaseholds, properties, rights, franchises, contracts, privilege, choses in action and effects of the defendant Metropolitan Street Railway Company which at the time of such sale are subject to the lien of the aforesaid mortgage made to  
Morton Trust Company, including all the property herein-  
205 after specifically described and directed to be sold, together with all and singular the improvements on said properties, and all and singular the railroads, lands, buildings, structures, fix-

tures, privileges, franchises, rights of way, trackage rights, contracts, consents, leaseholds, easements, and other rights and interests of Metropolitan Street Railway Company, owned by it on March 21, 1902; all and singular the tracks, sidetracks, or sidings, switches, rails, bridges, fences, buildings, depots, station houses, power houses, car houses, machine shops, repair shops, and other shops and all other buildings, improvements, erections, and structures, and all dynamos, belting, engines, boilers, regulators, meters, poles, trolleys, conduits, feeders, cables, wires, switchboards, lamps and machinery for producing, generating, and distributing electricity or power, all and singular the rolling stock, equipment, motors, engines, tenders, carriages, cars, trucks, horses, harness, tools, implements, furniture, fixtures, machinery, materials, coal, wood, oil, fuel, and other supplies, all maps, drawings, profiles, licenses, records, deeds, contracts, and agreements, patents, and patented inventions and processes owned by the Metropolitan Street Railway Company on March 21, 1902, and remaining in possession of the receivers of that company at the time of sale; also all improvements and additions made upon and to any and all of said railroads or property, real and personal, subsequent to March 21st, 1902, and any and all equipment therefor and renewals and replacements of the same and of any part thereof and of the appurtenances, and all and every other railroad which the railway company subsequent to March 21st, 1902, acquired or constructed by means of the proceeds of any of the bonds

206 secured by said mortgage made to Morton Trust Company, and all power houses, real estate, equipment, and other property, real or personal, appurtenant thereto, and all property acquired by Metropolitan Street Railway Company after March 21st, 1902, in connection with the premises and property, described in the granting clauses of the mortgage made to Morton Trust Company, and all renewals and replacements of said property, and all additions, switches, sidetracks, betterments, and improvements thereto not subsequently released from the lien of said mortgage made to Morton Trust Company.

The property so directed to be sold shall include particularly the following lot designated as lot one, which is subject to the lien of the mortgage dated February 1, 1897, made by Metropolitan Street Railway Company to Guaranty Trust Company of New York as trustee, and is to be sold subject to the said mortgage and to the lien of the receivers' certificates mentioned in Article II of this decree, and to the legal effect of the decree filed on the 6th day of April, 1910, in the Circuit Court of the United States for the Southern District of New York in a certain suit in equity pending in said court wherein Guaranty Trust Company of New York is complainant and Metropolitan Street Railway Company, Morton Trust Company and others are defendants:

Provided, however, that if, prior to the sale herein directed to be made by the Special Master hereinafter appointed, the special master

appointed under the aforesaid decree of this court filed April 6th, 1910, shall have offered for sale in accordance with the provisions of said decree filed April 6th, 1910, the property directed to be sold therein, and shall have provisionally accepted any bid thereon, then and in that case the special master hereinafter appointed in this decree shall not sell until the further order of this court the property or any part thereof hereinafter in this article described and designated as lot one.

(Here follows a description and enumeration of the railways, properties, and franchises and the real and personal property formerly owned by certain railroad companies, and all the rights which the Metropolitan Street Railway Companies had on June 14, 1897, for the operation of its cars upon the tracks or roads of other street railway companies in connection with the said railways, routes, and franchises just enumerated, particularly including its rights under a trackage agreement with the Thirty-fourth Street Crosstown Railway Company, and all claims, demands, and rights of action whatsoever of the Metropolitan Street Railway Company or its receivers against the said Thirty-fourth Street Crosstown Railway Company arising out of or connected with the subject matter of the said trackage agreement, and a description of certain railroads, tracks, routes, and franchises, real estate, contracts, contract rights, and other property described and included in certain indentures of lease made by other street railway companies and owned by the Metropolitan Street Railway Company, and an enumeration and description of certain parcels of land, with the buildings and improvements thereon, situate, lying, and being in the borough of Manhattan, city of New York, together with the tools, chattels, machinery, engines, and equipment of every description, located on the said land or generally kept or used in connection therewith for any purpose connected with the maintenance or operation of the said railways, or any of them, and which at the time of the sale shall continue to be in the possession of or under the control of the receivers of the said Metropolitan Street Railway Company, including all cables and their appurtenances for the transmission of current and all the appurtenances appertaining thereto, and all the horses, cars, tools, chattels, machinery, engines, and equipment of every description located upon the said premises or generally kept or used in connection therewith, and all fixtures, and certain shares of capital stock of other street railroad companies, and certain bonds of other street railroad companies, and all the right, title, and interest of the Metropolitan Street Railway Company in and to all rent due or to become due under a certain lease made by the said Metropolitan Street Railway Company to the Interurban Street Railway Company (now the New York City Railway Company), and all demands, claims, contracts, rights, interests, notes, bonds, stocks, choses in action, and all assets and property of every nature and description, real and personal, except cash in hand, not before specifically described and enumerated.)



## V.

That an inventory shall be prepared by the special master herein appointed, and by him filed with the clerk of this court when and as directed by this court. This inventory will enumerate the rolling stock of the road in the possession of the receivers, stating the type and character of each item and giving its number. This inventory will also state the number and location of the various dynamos, transformers, and converters, and the number of horses. The inventory shall include such other articles of personal property in the possession of the receivers as in their opinion are of a value in  
 209 excess of \$100 each, and such additional articles as the special master shall think it wise to include. Such inventory shall be advisory only and shall not, with respect to value or title or any other matter be construed as a warranty, but all purchases shall be deemed to be made upon the purchasers' own knowledge or information as to the property purchased.

Provided, however, that said special master shall not be required to prepare or file such inventory if the special master appointed under the aforesaid decree of this court filed April 6, 1910, in the suit of Guaranty Trust Company of New York as complainant, against Metropolitan Street Railway Company and others as defendants, shall have previously prepared and filed the inventory therein directed to be prepared and filed.

The property, both real and personal, hereby directed to be sold may be inspected by intending bidders at the sale hereunder, subject to such reasonable regulations as the receivers may prescribe.

## VI.

That any purchaser of any of the property of the Metropolitan Street Railway Company at the sale hereby decreed, may satisfy and make good the balance of his bid, above the sum required to be paid in cash, in whole or in part, by delivering to the special master appointed to conduct such sale, bonds duly certified under the mortgage made to Morton Trust Company mentioned in Article I of this decree, or coupons thereto appertaining, which bonds, unless in negotiable form and payable to bearer, shall be duly endorsed or signed in blank. Such bonds or coupons, whether delivered to the said special master at the time of sale or subsequently, shall be received  
 210 at such price or values as shall be equivalent to the sum which would be payable out of the net proceeds of such sale, if made for money, to the holder or holders of said bonds or coupons, for his or their just share or proportion in that character of such net proceeds, upon a due accounting and apportionment and distribution of such net proceeds. If there shall be realized on the sale and applied on the purchase price the entire amount due upon said bonds or

coupons, then and in that case the said bonds and coupons, or such of them as are so paid in full, shall be cancelled and retained by the special master; provided that when all said bonds and coupons issued under and secured by said mortgage and remaining unpaid, shall be cancelled and held by the special master, he may deliver them to the trustee of the mortgage securing the same, upon receiving a satisfaction thereof.

But if said entire amounts are not realized on the sale and applied upon the purchase price, the special master shall stamp or write upon each bond or coupon the amount which is so applied, and also the amount of the deficiency remaining after such application, and shall return such bonds and coupons to the purchaser or purchasers from whom the same were received.

## VII.

That the fund arising from the sale of the properties above directed to be sold be applied as follows, namely:

(1) To the payment of the costs of this cause and of all proper expenses attendant upon said sale or sales, including the compensation of the special master appointed to make the sale, and to the payment also of all charges, compensations, allowances, and disbursements of the complainant as trustee and its solicitors and  
211 counsel, to the extent that said expenses, charges, compensation, allowances and disbursements shall be allowed by this court, and shall not be payable out of other funds pertaining to said trust.

(2) The balance of the fund arising from the sale of the properties hereinabove described and by this decree directed to be sold shall be distributed, together with the proceeds of the sale of all the other property of the Metropolitan Street Railway Company and the property of the New York City Railway Company now in possession of the court or hereafter to come into such possession, including any balance of the funds in the possession of the receivers of either or both of said companies which may be available for such distribution, among all creditors, claimants, and persons interested therein, including the officers of this court, their counsel, and the counsel of all parties interested in the said fund, proceeds, and property for distribution or any part thereof, in accordance with their respective rights and priorities to be hereafter determined by the court, upon such notice to the respective parties in interest as the court may direct.

## VIII.

That said property hereby directed to be sold shall, except as hereinafter provided, be sold free and clear of the lien of the receivers' certificates described in Article II of this decree, but the several lots

hereinbefore directed to be sold shall be sold subject to all taxes and assessments on said lots respectively, and to the lien of any receivers' certificates that may have been or may be issued for the purpose of extinguishing the lien of any such taxes and assessments on said lots respectively and to liens prior to the aforesaid mortgage made to Morton Trust Company, existing in favor of any person or persons, corporation or corporations, not a party to this cause, or existing in favor of the complainant or of Guaranty Trust Company of New York for the security of the bonds or any of them decreed to be sold hereunder and enumerated as lot nine of Article IV of this decree; except such liens as are herein specifically directed to be paid out of the proceeds of sale, or which are reserved for future adjudication under subdivision 2 of Article VII hereof.

The property hereinbefore described in Article IV of this decree as lot one shall be sold subject also to the lien of the aforesaid mortgage dated February 1, 1897, made to Guaranty Trust Company of New York as trustee and to the lien of the receivers' certificates mentioned in Article II of this decree and to the legal effect of the aforesaid decree of this court filed April 6, 1910, in the suit of Guaranty Trust Company of New York against Metropolitan Street Railway Company and others.

#### IX.

That it shall be a condition of sale of the property described as lot one in Article IV hereof that the purchaser of such property shall, as a part of the consideration for such sale, and in addition to the price bid, assume all pending, uncompleted, and not fully executed contracts in respect to the property of the Metropolitan Street Railway Company, whether leasehold or otherwise, theretofore made by the receivers of the New York City Railway Company, or the receivers of the Metropolitan Street Railway Company, for the operation, maintenance, and betterment of the railway system operated by said receivers as a going concern; and shall also assume liability

for all claims in tort, whether in suit or presented or not, arising during the period of operation of said railway system by receivers appointed by this court, which shall not have been paid and discharged by said receivers at the time of said sale. In the event that said purchaser or purchasers shall refuse after demand made to perform any such contract or discharge any such indebtedness, obligation, or liability, the person or persons holding the claims therefor may upon fifteen days' notice to said purchaser or purchasers, their successor or successors, assign or assigns, file his or their petition in this court to have such claim enforced against the property aforesaid in accordance with the usual practice of this court; and such purchaser or purchasers, and his or their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt, or demand so sought to be enforced.

and either party shall have the right to appeal from any judgment, decree, or order made thereon.

Jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree; and the court reserves the right to retake and resell said property in case the purchaser or purchasers, his or their successors or assigns, shall fail to comply with any order of the court in respect to the performance of such contract or the payment of such indebtedness, obligation, or liability within thirty days after service of a certified copy of such order. No purchaser shall be held personally liable under this article of the decree for any unpaid indebtedness of the receivers or for any work done or materials furnished under any unfinished contract except such as shall have been done or furnished after the delivery of possession of the property sold to such purchaser and with his

consent. Subject to that exception, the methods herein provided for enforcing the liability of the purchaser for the unpaid indebtedness and other obligations of the receivers or for their unfinished contracts shall be exclusive of all other remedies.

The foregoing provisions shall not, however, in any manner apply to any purchaser of any of the property herein directed to be sold other than the property described as lot one in Article IV of this decree; and no such purchaser of any other lot or portion of the property herein directed to be sold shall be responsible in any manner for any contract in respect to property of the Metropolitan Street Railway Company made by the receivers of the New York City Railway Company or the receivers of the Metropolitan Street Railway Company, or for any tort which arose during the period of operation of the said railway system by receivers; but such purchaser or purchasers shall take said property free and clear of any such claims.

Said receivers shall, prior to the sale hereunder and as soon as practicable, file with the clerk of this court and with the special master a statement in such detail as they shall find practicable showing the principal items of indebtedness, obligations, and liabilities contracted or incurred by them remaining unpaid under all pending uncompleted and not fully executed contracts and a list of the chief contracts to be assumed by the purchaser hereunder. Said receivers shall, within two weeks prior to the time of sale, file with the clerk of this court and the special master a further statement showing as definitely as they shall find practicable any additional indebtedness, obligations, or liabilities contracted and incurred and outstanding, and also the amount of the indebtedness, obligations, and liabilities included in such first statement which may have been discharged; but all such statements shall be advisory only and shall in no wise constitute a warranty, nor shall any such statement or notice constitute ground for a release from any bid because of any representation therein or omission therefrom.

If said receivers shall have previously filed the statement or statements required to be filed pursuant to the decree of this court filed

April 6, 1910, in the aforesaid suit in equity now pending in this court, wherein Guaranty Trust Company of New York is complainant and Metropolitan Street Railway Company and others are defendants, or if the special master appointed by the said decree of this court filed April 6, 1910, shall have prior to the sale hereunder offered for sale the property described in said decree filed April 6, 1910, and shall have provisionally accepted any bid, then the receivers shall be exempt from filing such statement or statements pursuant to the provisions of this decree.

## X.

That subject to the provision contained in Article IV of this decree in respect to the previous sale of the property described as lot one in said Article IV, all the property directed by this decree to be sold shall be sold by William L. Turner, Esq., who is hereby appointed special master for that purpose, at such date as may be fixed by the court and at an hour to be fixed by him, at the north main entrance of the county courthouse of the county of New York, in the city of New York, with power to adjourn said sale at any stage of the proceedings to any room in said courthouse which he may be permitted to use by the authorities having the custody thereof, and with power to adjourn said sale from time to time to a future day by oral  
 216 announcement at the time appointed for the sale, upon consent of the solicitor for the complainant, or with the approval of the court, without prejudice to the notice of sale and without the necessity of publishing any further notice; but the special master may, notwithstanding, give such notice of any such adjournment by publication or otherwise as he shall think fit.

The special master shall give notice of such sale by publication once a week for not less than four consecutive weeks in one newspaper of general circulation printed and published *and published* in the city and county of New York, which notice shall contain a brief general description of the property to be sold, a statement of the time and place of the sale, and a reference to this decree for a more particular description of such property, and a statement of the terms and conditions of sale. The special master shall give such further notice of such sale by publication or otherwise as he shall think fit. Any party to this cause, or any holder of any of the bonds or coupons herein mentioned, may purchase at such sale and may hold the property purchased in his, its, or their own right, free from any trust or right of redemption.

## XI.

The special master, subject to the provision contained in Article IV hereof in respect to a previous sale thereof, shall first invite bids upon the property described and designated as lot one in Article IV

hereof, being the property to be sold subject to the said mortgage to Guaranty Trust Company of New York, dated February 1, 1897, and subject to the lien of the receivers' certificates mentioned in Article II of this decree, including the interest therein of all parties to this cause except the interest of Guaranty Trust Company of New York as trustee under the mortgage dated February 1, 1897, and except such interest and right of resale as is expressly reserved by Article IX of this decree, and shall provisionally accept the bid of the highest bidder for said lot one.

The special master shall next invite bids upon each of the several lots described and designated in Article IV herein, respectively, as lots two to twelve, both inclusive, separately, including the interest therein of all parties to this cause, and shall provisionally accept the bid of the highest bidder for each of such lots so offered; provided, however, that if the total aggregate bids on the several lots described and designated as lots two to twelve, both inclusive, so separately offered shall be less than two million dollars, in cash, or shall be less than the bid on the property particularly described and designated as lots two to twelve, both inclusive, to be sold in one parcel as an entirety as next hereinafter provided, then such provisional acceptance of the several bids by the special master shall be null and void.

The special master shall also invite bids upon all the property particularly enumerated and described as lots two to twelve, both inclusive, in Article IV, of this decree, being such of the property subject to the mortgage made to Morton Trust Company as is herein decreed to be so subject, but not subject to the aforesaid mortgage to Guaranty Trust Company of New York, dated February 1, 1897, in one parcel as an entirety, including the interest therein of all parties to the cause, and shall provisionally accept the bid of the highest qualified bidder for such property so offered; provided, that said bid shall not be less than two million dollars, in cash, and provided also that said bid shall not be less than the total aggregate bids on the several lots described and designated as lots two to twelve, inclusive, so separately offered.

The special master shall report all bids so provisionally accepted to the court.

## XII.

That unless the court shall otherwise direct, for just cause shown, upon the petition of any person desiring to bid at such sale, no bid shall be received from any person for the lots described and designated as lots two to twelve, both inclusive, on the sale thereof in one parcel as an entirety, who shall not first deposit with the special master the sum of one hundred thousand dollars (\$100,000), either in cash or in a check certified by a national or State bank or trust company situate in the city of New York.

Bids shall be received for each one of the lots described and designated as lots one to twelve, both inclusive, when offered for sale separately, without any previous qualification, but bidders for the said several lots so separately offered, whose bids shall be provisionally accepted as aforesaid, shall deposit with the special master, upon the provisional acceptance of such bid, a sum equal to five per centum on the amount of such bid, either in cash or in a check certified by a national or State bank or trust company situate in the city of New York.

The cash or check deposited by any bidder at the sale shall be held as a pledge that such bidder will make good his bid if accepted by the court. The cash or checks so deposited, except those deposited by any bidder whose bid shall remain provisionally accepted, shall be returned by the special master at the conclusion of the sale to

the bidder or bidders from whom they were received. The  
219 cash or checks so deposited by any bidder or bidders whose bid shall be provisionally accepted as provided in this decree shall be returned by the special master to the bidder or bidders from whom they were received if such provisional acceptance shall thereafter become null and void or shall not be confirmed by the court.

The cash or checks deposited by any bidder at the sale shall be forfeited and applied to the expenses of said sale and of the receivership of the property of the Metropolitan Street Railway Company in the event that the said bidder shall not make good his bid.

In the event that any successful bidder shall fail to make good his bid as the court shall direct upon confirmation to him of such sale, the court may order a resale of the property covered by such bid, and the said bidder shall be liable for all the expenses thereof and for any deficiency of price realized thereon.

### XIII.

That in addition to the cash deposited upon any bid at the time of said sale as hereinbefore required, which shall be received as a part of the purchase price, there shall also be paid in cash by the purchaser upon the confirmation of such sale and from time to time thereafter such further portions of the purchase price of said property as the court may direct.

All sums of money received upon any such sale shall be deposited by the special master in the Guaranty Trust Company of New York.

The court reserves the right to reject any bid and to retake and resell the property purchased upon the failure of any purchaser to comply with the terms of sale or with any order of the court  
220 requiring payment within thirty days after service upon such purchaser of a certified copy of such order.



## XIV.

That the enumeration in this decree or in the inventory hereby directed to be prepared of any lease or traffic or trackage or operating agreement or other executory contract to which the Metropolitan Street Railway Company or any of its constituent companies is a party, or by which it may in any manner be bound, shall not be deemed to constitute an adoption of such lease, agreement, or contract by the court or by the receivers, and the court reserves the right, notwithstanding this decree, or any sale hereunder, from time to time to direct the receivers whether or not to adopt any such lease, agreement, or contract. At any time after confirmation of the sale and before delivery of possession to the purchaser of the property affected by any such lease, agreement, or contract, the court will direct the receivers to take such action in respect to the adoption or nonadoption of any such lease, agreement, or contract as may be requested by the accepted bidder for the same or the property affected thereby, upon receiving such indemnity as the court shall deem necessary for the protection of the receivers.

Any purchaser or purchasers of the property directed to be sold by this decree or of any part thereof shall be allowed one year from the date of confirmation within which to elect to adopt and continue in force, or to refuse to adopt, any lease, traffic or trackage or operating agreement or other executory contract, which may be included in the property sold to him or them or may constitute an incident or appurtenance thereof.

221 Such election shall be made by an instrument in writing subscribed by such purchaser or purchasers, and filed in the office of the clerk of this court, and no conduct or user of rights by any purchaser or purchasers, within such period of one year, unaccompanied by the filing of such written instrument, shall be deemed to conclude the purchaser or purchasers in respect to such election. In the event of the failure by such purchaser or purchasers to file a statement of election to refuse to adopt any such contract within the period of one year above allowed, he or they shall be deemed to have elected to adopt such contract, and to accept the same as part of the property purchased.

In the event that such purchaser or purchasers shall elect not to adopt any such lease, traffic or trackage or operating agreement or other executory contract, he shall re-assign and re-transfer all his right, title, and interest in the same to the Metropolitan Street Railway Company, or its receivers or assigns, without deduction, however, from the sum paid or payable by him on account of his purchase thereof. Pending such election by such purchaser or purchasers, Metropolitan Street Railway Company, or its receivers or assigns, shall have the right to make any payments which may be necessary to be made in order to preserve the rights acquired under

such lease, traffic or trackage or operating agreement, or other executory contract, and any such payment so made by Metropolitan Street Railway Company, its receivers or assigns, shall be repaid to the Metropolitan Street Railway Company, its receivers or assigns, by the said purchaser or purchasers, and such repayment shall be

enforceable against said purchaser in the manner specified in 222 Article IX hereof. The court reserves power to direct the payment by such purchaser or by the receivers of such amounts as shall be found to be equitable upon an accounting, or otherwise, in respect to any lease, traffic or trackage or operating agreement which the purchaser hereunder shall elect not to adopt, or which he shall require the receivers to elect not to adopt, and jurisdiction over the property hereby directed to be sold is reserved to enforce such payment.

### XV.

That the court reserves the exclusive power and jurisdiction to deliver to the purchaser or purchasers, title to, and possession of, the property hereby directed to be sold and to determine any and all controversies as to the character, extent, and validity of the possession of such purchaser or purchasers acquired through the execution of this decree.

The special master shall put the purchaser or purchasers of the several portions of the property sold to them respectively hereunder in possession, and the purchaser or purchasers shall take possession of such property so sold under this decree within 60 days after the date of entry of the decree confirming said sale; but the court reserves the right upon good cause shown to postpone the date of such delivery of possession.

### XVI.

That upon confirmation of the sale hereinbefore ordered, and upon compliance with the terms of sale by the purchaser or purchasers of the property of the Metropolitan Street Railway Company above directed to be sold, the special master is hereby authorized and required to make, execute, and deliver to such purchaser or purchasers, or his or their assigns, a proper instrument or instru-

223 ments of conveyance, assignment, and transfer of the properties so sold, in which instrument or instruments the receivers of the Metropolitan Street Railway Company shall join and upon the request of the purchaser or purchasers, and upon the execution of such instrument of conveyance, assignment, and transfer, the Metropolitan Street Railway Company and each and every person holding the record title to any part of the property herein described, or directed to be sold for the account of the Metropolitan Street Railway Company, shall execute and deliver to such purchaser or

purchasers, all such instruments of transfer, assignment or further assurance as shall be necessary to establish and perfect the title of such purchaser or purchasers to the property so sold.

The purchaser or purchasers receiving such instrument or instruments of conveyance, assignment, or transfer from the special master shall be invested with and shall hold possession of and enjoy the said property, and all the rights and franchises appertaining thereto, subject to the provisions of this decree, as fully and completely as the Metropolitan Street Railway Company or its receivers now hold or enjoy and have heretofore held and enjoyed the same. And further, that the said purchaser or purchasers shall have and be entitled to hold the said properties and each parcel of the same so sold, freed, and discharged of and from the lien of the mortgage made to Morton Trust Company mentioned in Article I of this decree, and of and from any lien arising out of any order of the court or action of the receivers herein, except as otherwise herein specifically provided, and from any and all title, interest, or claim of said Metropolitan

Street Railway Company, its stockholders, creditors, and receivers, and of any and all parties to this cause, except as otherwise herein specifically provided, and any and all persons claiming by, through, or under them, or any of them.

#### XVII.

That the court reserves power to enter a decree pro confesso against the defendant the Central Crosstown Railroad Company of New York at any time after the expiration of thirty days from and after May 9th, 1910, and to enter a decree pro confesso against the defendant William T. Campbell as administrator of the goods, &c., of John Campbell, deceased, at any time after the expiration of thirty days from and after May 14th, 1910, and to enter a decree pro confesso against the defendant Samuel Angelo at any time after the expiration of thirty days from and after May 16th, 1910.

#### XVIII.

That the court reserves for further determination all matters of equity not herein expressly adjudged, and any party to this cause or other claimant contemplated in this decree may apply for further order and direction touching the matters in issue undisposed of by this decree. The October, 1908, equity term of this court is extended until after the complete execution of the provisions of this decree and until after the final disposition of all matters herein reserved for future determination or action by this court.

Dated May 31st, 1910.

E. HENRY LACOMBE,  
*United States Circuit Judge.*

225

## Schedule 12.

In the Circuit Court of the United States for the Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY,  
as trustee, successor of Morton Trust  
Company, as trustee, complainant,  
*against*

METROPOLITAN STREET RAILWAY COMPANY,  
Adrian H. Joline and Douglas Robinson,  
as receivers of Metropolitan Street Rail-  
way Company: New York City Rail-  
way Company. William W. Ladd, as  
receiver of New York City Railway Com-  
pany: The Pennsylvania Steel Com-  
pany, the Degnon Contracting Company,  
the Central Crosstown Railroad Com-  
pany of New York, Guaranty Trust Com-  
pany of New York, John I. Waterbury,  
Edmund C. Converse, and Harry S. Hop-  
per, as a committee representing stock-  
holders of Metropolitan Street Railway  
Company: John D. Crimmins, Samuel

A. Megeath, and Daniel M. Brady,  
226 as a committee of contract creditors  
of the New York City Railway Com-

pany: Charles Benner, Benjamin S.  
Catchings, and Thomas C. McDonald, as a  
committee of tort creditors of New York  
City Railway Company: and Arthur J.  
Nathan, Winifred Carlos, Jane Hart,  
Leon B. Ginsburg, Charles Olsen, Emma  
A. Dambmann, George Werner, Joseph M.  
Goodman, Maria Keim, Walter C. W.  
Auferman, Fred Hulberg, Samuel An-  
gelo, Frank G. McCort, Louis Laurie,  
Agnes O'Brien, Thomas Carney, Henry  
Miller, John Solomon, Irene Melius,  
Morris Bernstein, William J. Gould,  
Jacob Green, Catherine Unsworth,  
Thomas H. Fennell, Augusta Gunther,  
Catherine Overin, Daniel Darby, Cor-  
nelius O'Keefe, William T. Campbell, as  
administrator of the goods, etc., of John  
Campbell, deceased: Wolf Schussler,  
American Surety Company of New  
York, and Vulcanite Portland Cement  
Company, defendants.

In Equity. No. 3-37.

227 This court having, by its decree of foreclosure and sale in  
the above entitled suit filed May 31, 1910, reserved from the

effect and operation of the sale therein ordered to be made, certain property, rights, and interests of Metropolitan Street Railway Company described in said decree under the headings "Lot thirteen," "Lot fourteen," "Lot fifteen," "Lot sixteen," "Lot seventeen," and "Lot eighteen," and all questions as to what portion of said property, rights, and interests are subject to the lien of the mortgage made by the Metropolitan Street Railway Company to Morton Trust Company, dated March 21, 1902, having been thereby reserved for future determination by the court, without prejudice to the right of the complainant herein thereafter to enforce the lien thereon of the said mortgage made to Morton Trust Company under and pursuant to the future direction of this court, and this court having reserved in and by said decree for future determination all matters of equity not therein expressly adjudged:

Now, due and timely notice of hearing of certain questions in respect to said property, rights, and interests so reserved from the effect and operation of the sale ordered to be made by said decree having been given by the complainant herein to all parties to the above entitled suit who have appeared herein, certain questions came on for a further hearing before this court on the 15th day of June, 1910, and after hearing Bronson Winthrop, Esq., of counsel for the complainant, and after hearing Brainard Tolles, Esq., of counsel for the Guaranty Trust Company of New York, as trustee under the mortgage made to it by the Metropolitan Street Railway Company, dated February 1, 1897, Arthur H. Masten, Esq., of counsel for Adrian H. Joline and Douglas Robinson, as receivers of Metropolitan Street Railway Company, and Charles E. Rushmore, George N. Hamlin, Esqs., of counsel for John D. Crimmins

et al., as a committee of contract creditors of New York City Railway Company, Matthew C. Fleming, Esq., of counsel for William W. Ladd, as receiver of New York City Railway Company, and Benjamin S. Catchings, Esq., of counsel for Charles Benner et al., as a committee of tort creditors of New York City Railway Company, it is

Ordered, adjudged, and decreed as follows:

# I.

That the mortgage made by the defendant Metropolitan Street Railway Company to Morton Trust Company as trustee, dated March 21, 1902, is a valid and subsisting mortgage constituting a lien upon all the property of the Metropolitan Street Railway Company which is directed to be sold by Article II of this supplemental decree and which is designated in said article as lot thirteen.

The said lot thirteen is not subject to the lien of the aforesaid mortgage dated February 1, 1897, made by Metropolitan Street Railway Company to Guaranty Trust Company of New York as trustee, and is to be sold free and clear from the lien of said mortgage.

## II.

That unless the defendant Metropolitan Street Railway Company shall be relieved from the operation of the decree of sale contained in said decree filed May 31, 1910, the special master appointed in said decree filed May 31, 1910, is hereby authorized and directed to sell at public auction to the highest bidder, in conformity with the directions in that behalf in said decree filed May 31, 1910, set forth, save as amended or supplemented by this decree, all and singular, the property, property rights, and interests described in the following lot:

229 (Here follows a description and enumeration of certain claims and rights of action against certain street railroad companies which accrued prior to March 21, 1902, arising out of or connected with the subject matter of the leases or traffic agreements with said street railway companies, or which arose in connection with the railroad system of the Metropolitan Street Railway Company, and all the right, title, and interest of the Metropolitan Street Railway Company in and to all rent, due and to become due, under a certain indenture of lease dated February 14, 1902, made by the said Metropolitan Street Railway Company to the Interurban Street Railway Company (now the New York City Railway Company) and all demands, claims, contracts, rights, interests, notes, bonds, choses in action, and all assets and property of every nature and description, real and personal, except shares of stock and cash in hand, including all interest of the receivers therein which belonged to the Metropolitan Street Railway Company on March 21, 1902, not before specifically described and designated, and all and singular the railroads, buildings, fixtures, privileges, franchises, rights of way, track-age rights, contracts, consents, leaseholds, easements and other rights and interests, tracks, buildings, machinery, engines, poles, cables, rolling stock, equipment, cars, horses, tools, implements, furniture, fixtures, materials and other supplies, maps, drawings, profiles, licenses, records, deeds, contracts, agreements, and patents owned on March 21, 1902, by the Metropolitan Street Railway Company, and all improvements and additions made thereon, and every other railroad acquired by the Metropolitan Street Railway Company subsequent to March 21, 1902, or constructed out of the proceeds of any of the bonds secured by the mortgage, and all the appurtenances thereto.)

230 The omission from the sale herein directed to be made, of the property described in the decree filed May 31, 1910, as "lot eighteen," shall not be deemed to be an adjudication that the demands, claims, contracts, and choses in action of Metropolitan Street Railway Company or of its receivers, arising out of or connected with the construction, maintenance, or operation since March 21, 1902, of the railroad system of the Metropolitan Street Railway Company as the same may have been constituted from time to time,

are not subject to the mortgage of Metropolitan Street Railway Company to Morton Trust Company dated March 21, 1902, and are not included in the description of subdivision (5) of this article. Nothing herein contained shall prevent the complainant or any person claiming through it or the purchaser hereunder from claiming hereafter that such claims or assets are included in the aforesaid subdivision (5) of this article; nor shall anything herein contained be construed as an expression of opinion touching the validity of such claim or claims.

### III.

That the description of the property directed to be sold by the aforesaid decree of foreclosure and sale filed in this suit on May 31, 1910, be amended by omitting that property described in subdivision (6) of lot twelve.

And the said decree of foreclosure and sale, filed May 31, 1910, is hereby amended accordingly.

### IV.

That the provisions of Article VIII of said decree of foreclosure and sale filed May 31, 1910, regarding liens upon the property described as lots two to twelve, both inclusive in said decree, shall also apply to the property directed to be sold by Article II of this decree.

### V.

That all the property directed by Article II of this decree to  
231 be sold shall be sold by the special master appointed to sell the property directed to be sold in said decree filed May 31, 1910, at the same time and place and subject to the same conditions and in the same manner except as otherwise specifically directed in this decree as if the property directed to be sold and hereinbefore in Article II hereof described as lot thirteen had been included in and had formed part of the lots described in said decree filed May 31, 1910, as lots two to twelve both inclusive.

The special master shall give notice of the sale of the property herein directed to be sold by publication once a week for not less than four consecutive weeks in one newspaper of general circulation printed and published in the city of New York, which notice shall contain a brief general description of the property to be sold, a statement of the time and place of the sale, and a reference to this decree for a more particular description of such property and a statement of the terms and conditions of sale. The special master shall give such further notice of such sale by publication or otherwise as he shall think fit.

Any party to this cause or any holder of any of the bonds or coupons mentioned in said decree filed May 31, 1910, may purchase at



such sale and may hold the property purchased in its, his, or their own right free from any trust or right of redemption.

## VI.

The special master, subject to the provision contained in Article IV of the said decree of foreclosure and sale filed May 31, 1910, in respect to a previous sale thereof, shall first invite bids upon the property described and designated as lot one in Article IV of said decree filed May 31, 1910, being the property to be sold subject to a certain mortgage described therein to Guaranty Trust Company of New York, dated February 1, 1897, and subject to the 232 lien of the receivers' certificates mentioned in Article II of said decree filed May 31, 1910, including the interest therein of all parties to this cause except the interest of Guaranty Trust Company of New York as trustee under the said mortgage dated February 1, 1897, and except such interest and right of resale as is expressly reserved by Article IX of said decree filed May 31, 1910, and shall provisionally accept the bid of the highest bidder for said lot one.

The special master shall next invite bids upon each of the several lots described and designated in Article IV of said decree filed May 31, 1910, respectively, as lots two to twelve, both inclusive, as hereinbefore amended, and in Article II hereof as lot thirteen, separately, including the interest therein of all parties to this cause, and shall provisionally accept the bid of the highest bidder for each of such lots so offered; provided, however, that if the total aggregate bids on the said several lots described and designated as lots two to thirteen, both inclusive, so separately offered shall be less than two million dollars (\$2,000,000), in cash or shall be less than the bid on the property particularly described and designated as lots two to thirteen, both inclusive, to be sold in one parcel as an entirety as next hereinafter provided, then such provisional acceptance of the several bids by the special master shall be null and void.

The special master shall also invite bids upon all the property particularly enumerated and described as lots two to thirteen, both inclusive, in Article IV of said decree filed May 31, 1910, as hereinbefore amended, and in Article II of this decree, being such of the property subject to the mortgage made to Morton Trust Company, as is therein and herein decreed to be so subject, but not subject to the aforesaid mortgage to Guaranty Trust Company of New 233 York, dated February 1, 1897, in one parcel as an entirety, including the interest therein of all parties to the cause, and shall provisionally accept the bid of the highest qualified bidder for such property so offered; provided that said bid shall not be less than two million dollars (\$2,000,000) in cash, and provided also that said bid shall not be less than the total aggregate bids on the said several lots described and designated as lots two to thirteen, both inclusive, so separately offered.

The special master shall report all bids so provisionally accepted to the court.

The provisions of Article IX of the said decree of foreclosure and sale filed May 31, 1910, are hereby amended in conformity with the foregoing provision of this Article VI.

## VII.

That unless the court shall otherwise direct, for just cause shown on the petition of any person desiring to bid at such sale, no bid shall be received from any person for the lots described and designated as lots two to thirteen as hereinabove amended, both inclusive, on the sale thereof in one parcel as an entirety, who shall not first deposit with the special master the sum of one hundred thousand dollars (\$100,000) either in cash or in a check certified by a national or State bank or trust company situate in the city of New York.

Bids shall be received for each one of the said lots described and designated as lots one to thirteen as hereinabove amended, both inclusive, when offered for sale separately without any previous qualification, but bidders for the said several lots so separately offered whose bids shall be previously accepted as aforesaid shall deposit with the special master upon the provisional acceptance of such  
234 bid a sum equal to five per centum on the amount of such bid either in cash or in a check certified by a national or State bank or trust company situate in the city of New York.

The cash or check deposited by any bidder at the sale shall be held as a pledge that such bidder will make good his bid if accepted by the court. The cash or checks so deposited, except those deposited by and bidder whose bid shall remain provisionally accepted, shall be returned by the special master at the conclusion of the sale to the bidder or bidders from whom they were received. The cash or checks so deposited by any bidder or bidders whose bid shall be provisionally accepted as provided in this decree shall be returned by the special master to the bidder or bidders from whom they were received if such provisional acceptance shall thereafter become null and void or shall not be confirmed by the court.

The cash or checks deposited by any bidder at the sale shall be forfeited and applied to the expenses of said sale and of the receivership of the property of the Metropolitan Street Railway Company in the event that the said bidder shall not make good his bid.

In the event that any successful bidder shall fail to make good his bid as the court shall direct upon confirmation to him of such sale, the court may order a resale of the property covered by such bid, and the said bidder shall be liable for all the expenses thereof and for any deficiency of price realized thereon.

The provisions of Article XII of the said decree of foreclosure and sale filed on May 31, 1910, are hereby amended in conformity with the foregoing provisions of this Article VII.

## VIII.

That upon confirmation of the sale hereinbefore ordered,  
 235 and upon compliance with the terms of sale by the purchaser  
 or purchasers of the property of the Metropolitan Street Rail-  
 way Company above directed to be sold, the special master is hereby  
 authorized and required to make, execute, and deliver to such pur-  
 chaser or purchasers, or his or their assigns, a proper instrument  
 or instruments of conveyance, assignment, and transfer of the prop-  
 erties so sold, in which instrument or instruments the receivers of the  
 Metropolitan Street Railway Company shall join, and upon the  
 request of the purchaser or purchasers, and upon the execution of  
 such instrument of conveyance, assignment, and transfer the Metro-  
 politan Street Railway Company, and each and every person hold-  
 ing the record title to any part of the property herein described or  
 directed to be sold for the account of the Metropolitan Street Rail-  
 way Company, shall execute and deliver to such purchaser or pur-  
 chasers all such instruments of transfer, assignment, or further as-  
 surance as shall be necessary to establish and perfect the title of such  
 purchaser or purchasers to the property so sold.

The purchaser or purchasers receiving such instrument or instru-  
 ments of conveyance, assignment, or transfer from the special master  
 shall be invested with and shall hold possession of and enjoy the  
 said property and all the rights and franchises appertaining thereto,  
 subject to the provisions of this decree, as fully and completely as  
 the Metropolitan Street Railway Company or its receivers now hold  
 or enjoy and have heretofore held and enjoyed the same; and fur-  
 ther, that the said purchaser or purchasers shall have and be en-  
 titled to hold the said properties and each parcel of the same so sold  
 freed and discharged of and from the lien of the mortgage made to

Morton Trust Company mentioned in Article I of this supple-  
 236 mental decree, and of and from any lien arising out of any or-  
 der of the court or action of the receivers herein, except as other-  
 wise in said decree filed May 31, 1910, or herein specifically provided,  
 and from any and all titles, interest, or claim of said Metropolitan  
 Street Railway Company, its stockholders, creditors, and receivers,  
 and of any and all parties to this cause, except as otherwise in said  
 decree filed May 31, 1910, and herein specifically provided, and any  
 and all persons claiming by, through, or under them or any of them.

## IX.

That all the provisions of Articles VI, VII, XIII, XIV, and XV  
 of the said decree of foreclosure and sale filed May 31, 1910, shall  
 apply to and govern the property herein directed to be sold and  
 described in Article II hereof as lot thirteen, and the sale thereof,  
 and the proceeds arising on the sale thereof.

## X.

That the court reserves for further determination all matters of equity not herein expressly adjudged, and any party of this cause or other claimant contemplated in this decree may apply for further order and direction touching the matters in issue undisposed of by this decree.

The October, 1910, equity term of this court is extended until after the complete execution of the provisions of said decree filed May 31, 1910, and of this decree and until after the final disposition of all matters hereinbefore in said decree filed May 31, 1910, or herein reserved for future determination and action by this court.

Dated New York, November 2, 1910.

E. HENRY LACOMBE,  
U. S. Circuit Judge.

237

*Opinion.*

United States District Court (Ex. C. C.), Southern District of  
New York.

THE PENNSYLVANIA STEEL COMPANY AND OTHERS	}
v.	
NEW YORK CITY RAILWAY COMPANY AND ANOTHER	}
(and three other actions).	
CENTRAL TRUST COMPANY	}
v.	
THE THIRD AVENUE RAILROAD COMPANY AND OTHERS	}
(and three other actions).	

These are applications made by the United States Attorney for the Southern District of New York on behalf of the collector of internal revenue for orders of this court requiring its officers, Messrs. Joline and Robinson, as receivers of the Metropolitan Street Railway Company, and Mr. Whitridge, as receiver of the Third Avenue Railroad Company (and of other street railway companies), to make and file returns for the years 1909 and 1910 "for the said companies of their, and each of their, net incomes," in the manner and form required by section 38 of the Tariff Act of August 5, 1909, the section known as the Corporation Tax Law.

The section reads as follows:

238 "Sec. 38. That every corporation, joint stock company, or association organized for profit, and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State \* \* \* shall be subject to pay annually a special excise

tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company, equivalent to one per centum of the entire net income over and above \$5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed."

For the U. S.: Addison S. Pratt, John N. Boyle, assistant U. S. Attys.

For Metropolitan receivers: Arthur H. Masten, William M. Coleman, James C. Tryon.

For Third Ave. receiver: Evarts, Choate & Sherman, H. T. Bickford.

LACOMBE, C. J.:

The question here presented was considered, somewhat hastily, in *Penn. Steel Co. v. N. Y. City Ry.*, 176 F. R., 471, 477. With the assistance of the exhaustive briefs which have been submitted, it has been given much more careful attention, but no reason is apparent for reaching a conclusion different from that already expressed.

When it is conceded, as it must be under *Flint v. Stone Tracy Co.*, 220 U. S., 107, that this tax is not imposed upon the property nor upon the franchises under which the railroad is operated in the different streets and avenues, most of the cases cited by the Government become inapplicable. Of course, the corporation could not avoid this tax by turning over its property and the operation of its road to some agent or trustee who is the mere alter ego of the corporation, but that is not this case. Receivers are sometimes referred to as the representatives of the corporations, but that expression is not exactly accurate. In receiverships of this sort the corporate life still continues, the corporation may go on electing officers and preserving its organization. Its property (including the franchises under which its road is operated) has been seized by the court, and is held for the benefit of creditors or persons entitled to it; sometimes the property thus seized is sold by order of the court, but such sale does not include the franchise of the debtor to be a corporation and to do business in a corporate capacity with the privileges thereby secured to it, as pointed out in *Flint v. Stone Tracy Co.*, *supra*, p. 161.

It does not seem to me that Congress, while avoiding carefully any taxation of the property of the corporation, intended to impose a tax upon the income realized from the assets of a bankrupt corporation whose property had been taken over by a court, through its officers, to be marshalled and distributed. Certainly the language used does not indicate any such intent.

The motion is denied.

240 *Order, filed February 8, 1912, denying petition of United States of America.*

District Court of the United States, for the Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY ET AL., COM- plainants, <i>against</i>	}	Equity No. 2-9.
NEW YORK CITY RAILWAY COMPANY, DEFENDANT.		

THE FARMERS' LOAN AND TRUST COMPANY, AS trustee, successor of Morton Trust Company, as trustee, complainant, <i>against</i>	}	Equity No. 2-33.
METROPOLITAN STREET RAILWAY COMPANY ET AL., defendants.		

GUARANTY TRUST COMPANY OF NEW YORK, COM- plainant, <i>against</i>	}	Equity No. 2-149.
METROPOLITAN STREET RAILWAY COMPANY ET AL., defendants.		

241 THE FARMERS' LOAN AND TRUST COMPANY, as trustee, successor of Morton Trust Company, as trustee, complainant, <i>against</i>	}	Equity No. 3-37.
METROPOLITAN STREET RAILWAY COMPANY ET AL., defendants.		

In the matter of the application of the United States of America for an order directing Adrian H. Joline and Douglas Robinson appointed receivers in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910 for the Metropolitan Street Railway Company of its net income to the collector of internal revenue for the second district of New York, in which district the said corporation had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L. 112).

242 This matter came on for hearing on the 24th day of November, 1911, upon the petition of the United States of America verified the 17th day of November, 1911, and the answer thereto of Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company, verified the 24th day of November, 1911, and upon all the pleadings, papers, and proceedings herein.

Whereupon, upon reading and filing the said petition and notice of hearing thereon, together with proof of the due service of the said petition and notice of hearing upon the solicitors for all parties to these causes, and after hearing Mr. Addison S. Pratt, Assistant United States District Attorney, in support of the said petition, and

Messrs. Arthur H. Masten, William M. Coleman, and James O. Tryon, of counsel for Adrian H. Joline and Douglas Robinson, as receivers for the Metropolitan Street Railway Company, appearing and submitting a brief in opposition thereto, and the court being fully advised in the premises, it is

Ordered, that the said petition be and the same hereby is in all respects denied.

Dated, February 7, 1912.

E. HENRY LACOMBE,  
U. S. C. J.

243 *Assignment of errors.*

United States District Court, Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY ET AL., COM- plainants, <i>against</i>	}	Equity No. 2-9.
NEW YORK CITY RAILWAY COMPANY, DEFENDANT.		

THE FARMERS' LOAN AND TRUST COMPANY, AS trustee, successor of Morton Trust Company, as trustee, complainant, <i>against</i>	}	Equity No. 2-33.
METROPOLITAN STREET RAILWAY COMPANY ET AL., defendants.		

GUARANTY TRUST COMPANY OF NEW YORK, COM- plainant, <i>against</i>	}	Equity No. 2-149
METROPOLITAN STREET RAILWAY COMPANY ET AL., defendants.		

244 THE FARMERS' LOAN AND TRUST COMPANY, as trustee, successor of Morton Trust Company, as trustee, complainant, <i>against</i>	}	Equity No. 3-37.
METROPOLITAN STREET RAILWAY COMPANY ET AL., defendants.		

In the matter of the application of the United States of America for an order directing Adrian H. Joline and Douglas Robinson, appointed receivers in each of the above-entitled actions to make a true and accurate return for the years 1909 and 1910 for the Metropolitan Street Railway Company of its net income to the Collector of Internal Revenue for the Second District of New York, in which district the said corporation had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L. 112).

*Assignment of errors.*

245 Come now the United States of America, petitioner in the above-entitled proceeding, by Henry A. Wise, United States



Attorney for the Southern District of New York, its solicitor, and makes and files the following assignment of errors which it alleges occurred upon the denial of its petition and in the entry and filing of the final order and decree herein dated the 7th day of February, 1912.

First. The court erred in dismissing the petition of the United States herein, duly verified the 17th day of November, 1911.

Second. The court erred in denying the petition of the United States herein, duly verified the 17th day of November, 1911.

Third. The court erred in refusing to grant the application contained in the said petition of the United States, duly verified the 17th day of November, 1911, for an order directing Adrian H. Joline and Douglas Robinson appointed receivers in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910 for the Metropolitan Street Railway Company of its net income to the collector of internal revenue for the second district of New York, in which district the said corporation had its principal place of business in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112).

Fourth. The court erred in not finding that Adrian H. Joline and Douglas Robinson, appointed receivers in each of the above entitled actions, were required, as principal officers of the Metropolitan Street Railway Company for the years 1909 and 1910, by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112) to make the true and accurate return contemplated and provided for by the said section of the said act of Congress.

246 Fifth. That the court erred in not deciding and holding that corporations in the hands of receivers conducting the business of, and operating and exercising all the rights, privileges, and franchises of, such corporations under the orders of the court appointing them were subject to the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112).

Sixth. That the court erred in not deciding and holding that the Metropolitan Street Railway Company, a corporation in the hand of receivers appointed in each of the above entitled actions, who were conducting and carrying on the business of and operating and exercising all the rights, privileges, and franchises of said corporation under the orders of the court appointing them, were subject to the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112); and the court erred in not deciding and holding that the net income within the meaning of said section 38 of the said act of Congress received by the said receivers from conducting and carrying on the business of the said corporations as aforesaid was subject to the payment of the tax provided for in section 38 of the said act of August 5, 1909.

Dated New York, April 23, 1912.

HENRY A. WISE.

*United States Attorney for the Southern District of New York,  
Solicitor for Petitioner. Office and P. O. Address, Room 50, U. S.  
Court and P. O. Building, Borough of Manhattan, New York City*

247

*Citation.*

By the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit.

To Metropolitan Street Railway Company. Adrian H. Joline and Douglas Robinson, as receivers of the Metropolitan Street Railway Company. New York City Railway Company. William W. Ladd, as receiver of New York City Railway Company. Pennsylvania Steel Company and Degnon Contracting Company. John D. Crimmins et al., as a committee of contract creditors. Guaranty Trust Company of New York. The Farmers' Loan and Trust Company, as trustee, successor of Morton Trust Company, as trustee, etc. The Farmers' Loan and Trust Company, as trustee, successor of Morton Trust Company, as trustee, etc. Benjamin S. Catchings et al., as a committee of tort creditors of New York City Railway Company. John I. Waterbury et al., as a committee under Metropolitan Street Railway Company stockholders' protective agreement. Central Park, North and East River Railroad Company. Central Crosstown Railway Company. The Eighth Avenue Railroad Company and the Ninth Avenue Railroad Company.

State of New York, City of New York.

248 You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the city of New York, in the district and circuit above named, on the sixth day of May, 1912, pursuant to a notice of appeal filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein United States of America are appellants and you are appellees, to show cause, if any there be, why the order and decree in said notice of appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 30th day of April, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-sixth.

E. HENRY LACOMBE.

*Circuit Judge of the United States for the Second Circuit.*

249 *Stipulation as to printing record.*

United States District Court, Southern District of New York.

THE PENNSYLVANIA STEEL COMPANY ET AL., complainants, <i>against</i> NEW YORK CITY RAILWAY COMPANY, DE- fendant.	}	Equity No. 2-9.
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THE FARMERS' LOAN AND TRUST COMPANY, AS trustee, successor of Morton Trust Company, as trustee, complainant, <i>against</i> METROPOLITAN STREET RAILWAY COMPANY ET al., defendants.	}	Equity No. 2-33.
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GUARANTY TRUST COMPANY OF NEW YORK, complainant, <i>against</i> METROPOLITAN STREET RAILWAY COMPANY ET al., defendants.	}	Equity No. 2-149.
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250 THE FARMERS' LOAN AND TRUST COM- pany, as trustee, successor of Morton Trust Company, as trustee, complainant, <i>against</i> METROPOLITAN STREET RAILWAY COMPANY ET al., defendants.	}	Equity No. 3-37.
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In the matter of the application of the United States of America for an order directing Adrian H. Joline and Douglas Robinson, appointed receivers in each of the above-entitled actions, to make a true and accurate return for the years 1909 and 1910 for the Metropolitan Street Railway Company of its net income to the collector of internal revenue for the second district of New York, in which district the said corporation had its principal place of business, in the manner and form required by the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112).

251 It is hereby stipulated and agreed that the appeal to the Circuit Court of Appeals in the above-entitled proceeding shall and may be heard upon the following papers, that is to say: The notice of motion and petition of the United States, verified the 17th day of November, 1911, the answer of Adrian H. Joline and Douglas Robinson, as receivers, verified the 24th day of November, 1911, the opinion of E. Henry Lacombe, circuit judge in the above-entitled proceeding, and the order of E. Henry Lacombe, circuit judge, dated the 7th day of February, 1912, in the above-entitled proceeding, the assignment of errors, dated the 23rd day of April, 1911, and the notice of appeal by the United States, dated the 23rd

day of April, 1912, the citation herein and this stipulation as to record on appeal.

Dated, New York, April 23, 1912.

HENRY A. WISE,

*United States Attorney for the Southern District of New York,  
solicitor for petitioner.*

J. PARKER KIRLIN,

*Solicitor for Metropolitan Street Railway Company.*

MASTEN & NICHOLS,

*Solicitors for Adrian H. Joline and Douglas Robinson, as receivers  
of the Metropolitan Street Railway Company.*

JAMES L. QUACKENBUSH,

*Solicitor for New York City Railway Company.*

DEXTER, OSBORN & FLEMING,

*Solicitors for William W. Ladd, as receiver of New York City  
Railway Company.*

252

BYRNE & CUTCHEON,

*Solicitors for the Pennsylvania Steel Company and  
Degnon Contracting Company.*

O'BRIEN, BOARDMAN & PLATT,

*Solicitors for John D. Crimmins et al., as a Committee of Con-  
tract Creditors.*

DAVIES, STONE & AUERBACH,

*Solicitors for Guaranty Trust Company of New York.*

GELLER, ROLSTON & HORAN,

*Solicitors for The Farmers' Loan and Trust Company, as trustee,  
successor of Morton Trust Company, as trustee, etc.*

BRONSON WINTHROP,

*Counsel for The Farmers' Loan and Trust Company, as trustee,  
successor of Morton Trust Company, as trustee, etc.*

CHARLES BENNER,

*Solicitor for Benjamin S. Catchings et al., as a Committee of  
Tort Creditors of New York City Railway Company.*

SIMPSON, THATCHER & BARTLETT,

*Solicitors for John I. Waterbury et al., as a Committee under  
Metropolitan Street Railway Company Stockholders' Protec-  
tive Agreement.*

STRONG & MELLEN,

*Solicitors for Central Park, North and East River Railroad  
Company.*

253

CRAVATH, HENDERSON & DE GERSDORF,

*Solicitors for Central Crosstown Railway Company.*

MICHEL KIRTLAND,

*Solicitor for the Eighth Avenue Railroad Company and the  
Ninth Avenue Railroad Company.*

THOMAS CARMODY,

*Attorney General of the State of New York.*

ARCHIBALD R. WATSON,

*Corporation Counsel of the City of New York. Solicitor for the  
City of New York.*

254

*Clerk's certificate.*

UNITED STATES OF AMERICA,

*Southern District of New York, ss:*

I, Thomas Alexander, clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 254, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause entitled The Pennsylvania Steel Company et al. v. New York City Railway Company et al., and three other cases, in the matter of the application of the United States of America, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 8th day of May in the year of our Lord one thousand nine hundred and twelve, and of the independence of the said United States the one hundred and thirty-sixth.

[SEAL.]

THOS. ALEXANDER, *Clerk.*

[912]

255 United States Circuit Court of Appeals for the Second Circuit.

No. 241-242—October term, 1911. Argued May 20, 1912. Decided July 18, 1912.

THE PENNSYLVANIA STEEL COMPANY ET AL.,  
complainants,

*vs.*

THE NEW YORK CITY RAILWAY COMPANY  
et al., defendants; The United States, ap-  
pellant. (Corporation income tax.)

THE CENTRAL TRUST COMPANY OF NEW YORK,  
complainant,

*vs.*

THE THIRD AVENUE RAILROAD COMPANY ET AL.,  
defendants; The United States, appellant.  
(Corporation income tax.)

Appeals from the District Court of the United States for the  
Southern District of New York.

Before Coxe, Ward, and Noyes, circuit judges.

On appeal from an order of the United States District Court for  
the Southern District of New York, entered February 7th, 1912,

256 denying the motion, made by the United States, for an order directing the receivers of the various railway corporations operating in the city of New York to make a true and accurate return of net income for the years 1909 and 1910 for each of the said corporations, respectively, to the collector of internal revenue, pursuant to the provisions of section 38 of the act of Congress of August 5, 1909 (36 Stat. L., 112). The questions in each of these actions are identical and, to save unnecessary repetition, may be considered in the case of the Metropolitan Street Railway Company.

Henry A. Wise, U. S. attorney, and Addison S. Pratt and John N. Boyle, assistant U. S. attorneys, for appellant.

Evarts, Choate and Sherman and Herbert J. Bickford for Whitridge, receiver.

Arthur H. Masten and Ellis W. Leavenworth for Joline and Robinson, receivers.

COXE, J.:

The facts are undisputed. The question is one of law, and may be epitomized as follows:

Are receivers of an insolvent corporation, duly appointed by a court of equity, which corporation was not engaged in business when the taxing act was passed, and has done no business since, required to make returns and pay taxes upon the income realized by them while acting as officers of the court and under its direction?

Section 38, so far as it is applicable to the present controversy, provides that every corporation organized for profit, and having a capital stock represented by shares, shall be subject to pay annually a special excise tax, with respect to the carrying on or doing business by such corporation, equivalent to one per centum upon the entire net income, over and above five thousand dollars, received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed.

The act further provides that a true and accurate return under oath or affirmation of its president, vice president, or  
257 other principal officer, and its treasurer or assistant treasurer, shall be made by the corporation to the collector for the district in which such corporation has its principal place of business, setting forth the amount of its paid-up capital stock, the amount of its bonded and other indebtedness, the gross amount of its income received during the year from all sources, the amount received by way of dividends, the total amount of all ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and the total amount of all losses actually sustained during the year. The act also provides for an accurate return of the interest paid during the year on the bonded and other indebted-

ness of the corporation, the amount paid by it for taxes, and its net income after making the deductions authorized by the act.

The act in question, levying as it does, a tax upon the citizen, must be strictly construed; it cannot be enlarged by construction to cover matters not clearly within its purport. The question is not what Congress might have done or should have done, but what it actually did do. When this is ascertained the duty of the court is accomplished. We are of the opinion that the act is inapplicable to receivers for the following reasons:

First. The taxation of business done and income received by receivers is not contemplated by the act, receivers are not mentioned. This omission cannot be attributed to inadvertence. The lawmakers unquestionably understood the situation; they knew that corporations frequently become bankrupt and are placed in the hands of receivers and yet no provision in the act relates to this contingency. It is not improbable that the intention was to avoid the decision of the Supreme Court in the Pollock case by confining the tax strictly to the doing of business in a corporate capacity. Whatever the reason may have been, the fact remains that the doing of business by receivers in their representative capacity, as officers of the court, is not taxed by the act and no provision is made therein for the ascertainment and collection of such a tax.

Second. There can be no doubt that the special excise tax provided for by the act is imposed as a tax upon doing business in a corporate capacity. In other words, if an enterprise be  
258 carried on through the instrumentality of a corporation, it must pay for the privilege. We so understand the decision of the Supreme Court upholding the act in question in *Flint v. Stone Tracy Co.*, 220 U. S., 107. The court says:

"The tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof \* \* \* when imposed in this manner it is a tax upon the doing of business with the advantages which is here in the peculiarities of corporate or joint stock organizations of the character described. \* \* \* It may be described generally as a tax upon doing of business in a corporate capacity. \* \* \* The tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. As was said in the *Thomas case*, 192 U. S., 363, *supra*, the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

If the business be carried on by an individual or a partnership, no tax is imposed. It is only when the parties interested seek the advantages and protection which a corporation, or a joint stock asso-



ciation, affords that the tax is payable. This proposition was decided in *Zonne v. Minneapolis Syndicate*, 220 U. S., 187. The court says:

"The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of the reorganization from any activity in respect to it. We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909."

Third. The act, in all its provisions, clearly contemplates that the tax is to be paid by a corporation which is actually  
259 engaged in business as an actively operating concern. It nowhere intimates that the tax can be collected unless the corporation is carrying on the business.

The net income upon which the tax is levied is to be ascertained by deducting from the gross income of the corporation expenses, losses, and interest on the corporation's bonded or other indebtedness and amounts actually paid by it for taxes and received by it as dividends upon stock of other corporations which are subject to taxation under the law. The return required by the act is to be verified by the president, vice president, or other principal officer, and the treasurer or assistant treasurer of the corporation, and must contain a statement of the corporation's financial condition in all particulars required by law. If the return is found to be incorrect, the act provides for further information by an examination of any officer or employee. The corporation is to be notified of the amount for which it is liable, and if it fails to make a return or makes a false or fraudulent return, it shall be liable to a penalty. It cannot be held that an act which nowhere mentions receivers and which in every paragraph deals with corporations and joint stock companies actually engaged in business can, by construction, be made to cover the business, temporarily undertaken, of conserving the property of such a corporation for the benefit of its creditors and the public.

Fourth. It is manifest that the functions of the Metropolitan Street Railway Company, as a corporation, were superseded when all its property was placed in the hands of receivers by a court of equity, in order that it might be saved for the benefit of all its creditors. It could no longer act in its corporate capacity, it could no longer operate the railroad; it lost, for the time at least, all dominion over its property. Its officers could not make the return required by the act for the obvious reason that the corporation had carried on no business during the years 1909 and 1910 and, therefore, had received no income from any source. The receivers could not make the return for the reason that they were neither the corporation nor the representatives thereof. During their administration the Metropolitan Company has not been carrying on corporate business and has received no income in that capacity. They were  
in possession as officers of the court and were subject to its  
260 orders. Whatever corporate functions the company possessed

were in abeyance during the period that the court held the property for the benefit of all the creditors.

Assuming that a net income could arise in such circumstances, and assuming further that Congress could constitutionally levy "a special excise tax with respect to carrying on the business of such corporation," we are clearly of the opinion that it has failed to do so under the present act.

Fifth. We have been presented by the United States attorney with an elaborate and learned brief showing great research and citing many cases involving the construction of State statutes, most of them arising in the State courts of New York, Pennsylvania, New Jersey, and Massachusetts. We agree, however, with the court below in thinking that "when it is conceded, as it must be under *Flint v. Stone Tracy Co.*, 220 U. S., 107, that this tax is not imposed upon the property nor upon the franchises under which the railroad is operated in the different streets and avenues, most of the cases cited by the Government became inapplicable."

We are, of course, bound by the law as enunciated by the Supreme Court, and we think that the decisions of that tribunal and of the other Federal courts cited by counsel sustain the conclusions reached.

The orders appealed from are affirmed.

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261 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the post-office building in the city of New York, on the 28th day of July, one thousand nine hundred and twelve,

Present: Hon. Alfred C. Coxe, Hon. Henry G. Ward, Hon. Walter C. Noyes, circuit judges.

Pennsylvania Steel Company et al., complainants, vs. New York City Railway Company et al., defendants. The United States, appellant. Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

W. C. N.

262 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Penn. Steel Co. vs. N. Y. City Ry. Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 30, 1912. William Parkin, clerk.

263 United States of America, Southern District of New York, ss.  
I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 262, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Pennsylvania Steel Company et al., complainants, against New York City Railway Company, defendant, The United States, appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 10th day of February, in the year of our Lord one thousand nine hundred and thirteen, and of the independence of the said United States the one hundred and thirty-seventh.

[SEAL.]

WM. PARKIN, *Clerk*.

264 United States of America, ss:

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit,

Greeting:

Being informed that there is now pending before you a suit in which the United States of America is appellant, and Adrian H. Joline and Douglas Robinson, as receivers of The New York City Railway Company and Metropolitan Street Railway Company et al. are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of

Appeals and removed into the Supreme Court of the United

265 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 13th day of March, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. MCKENNEY,

*Clerk of the Supreme Court of the United States.*

266 (Endorsed:) File No. 23559. Supreme Court of the United States, No. 984, October term, 1912. The United States vs. A. H. Joline et al., receivers, etc., et al. Writ of certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 31, 1913. William Parkin, clerk.

267 In the Supreme Court of the United States. October term, 1912.

THE UNITED STATES, PETITIONER,

*vs.*

ADRIAN H. JOLINE AND DOUGLAS ROBINSON, } No. 984.  
receivers, etc., respondents.

*Stipulation as to return to writs of certiorari.*

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted therein.

March 14, 1913.

J. C. McREYNOLDS,  
*Attorney General.*

ARTHUR H. MASTEN,  
*Counsel for Respondents.*

(Endorsed:) U. S. vs. Joline. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 31, 1913. William Parkin, clerk.

268 To the honorable the Supreme Court of the United States—  
Greeting:

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, March 31st, 1913.

[SEAL.]

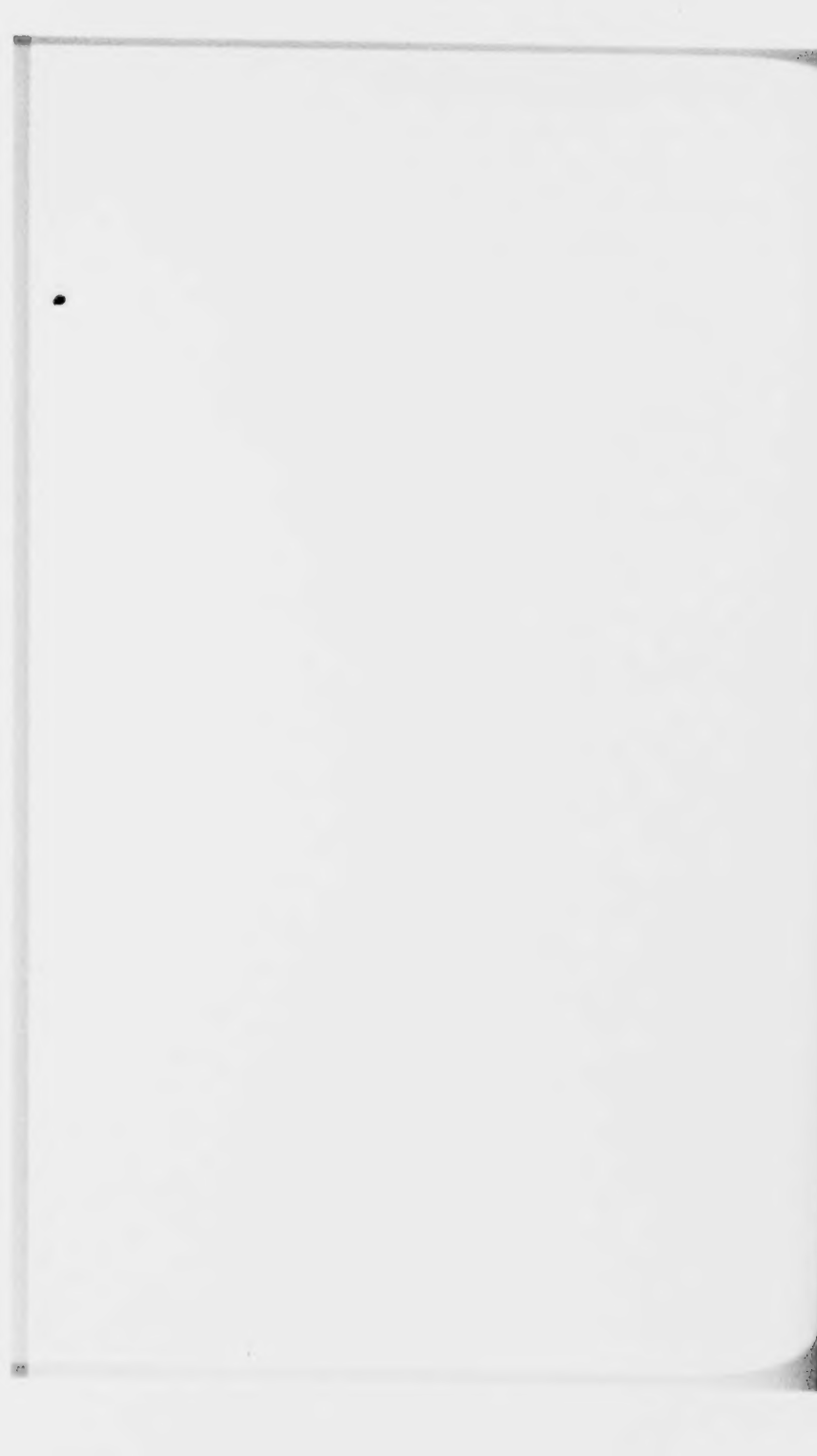
WM. PARKIN,

*Clerk of the United States Circuit Court of Appeals  
for the Second Circuit.*

*Clerk of the United States Circuit Court of Appeals for the Second Circuit.*

269 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. United States v. A. H. Joline & ano., as receivers, etc. Return to certiorari. Office of the clerk, Supreme Court U. S. Received April 3, 1913.

270 (Indorsed:) File No. 23559. Supreme Court U. S., October term, 1912. Term No. 984. The United States, petitioner, vs. A. H. Joline et al., receivers, &c. Writ of certiorari and return. Filed April 3, 1913.



19  
466 467  
Nos. 808 & 809

Office Supreme Court,  
FILED.

FEB 20 1913

JAMES H. McKENNA

**In the Supreme Court of the United States**

OCTOBER TERM, 1912.

CENTRAL TRUST COMPANY OF  
NEW YORK ET AL.

v.

THE THIRD AVENUE RAILROAD  
COMPANY ET AL., AND  
THREE OTHER CASES.

THE PENNSYLVANIA STEEL  
COMPANY ET AL.

v.

NEW YORK CITY RAILWAY  
COMPANY, AND THREE  
OTHER CASES.

In the matter of the application of the United States of America for orders directing the receivers appointed in the above-entitled actions to make and file returns under the corporation tax law of the net income of the corporations of which they have been appointed receivers.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

**PETITION OF THE UNITED STATES FOR WRITS OF  
CERTIORARI.**

In support of the contention that an insolvent corporation "is doing business" within the meaning of the corporation tax law even though it is in the hands of a receiver; and such receiver must make the returns prescribed by that law.

WM. MARSHALL BULLITT,  
*Solicitor General.*

WM. C. HERRON,  
*Attorney.*





# In the Supreme Court of the United States.

OCTOBER TERM, 1912.

---

CENTRAL TRUST COMPANY OF NEW YORK

*v.*

THE THIRD AVENUE RAILROAD COMPANY ET AL.

AMERICAN HAY COMPANY

*v.*

DRY DOCK, EAST BROADWAY AND BATTERY RAIL-  
ROAD COMPANY.

THE BARBER ASPHALT PAVING COMPANY

*v.*

THE FORTY-SECOND STREET, MANHATTANVILLE AND  
ST. NICHOLAS AVENUE RAILWAY COMPANY.

THE LORAIN STEEL COMPANY

*v.*

UNION RAILWAY COMPANY OF NEW YORK CITY.

THE PENNSYLVANIA STEEL COMPANY ET AL.

*v.*

NEW YORK CITY RAILWAY COMPANY.

THE FARMERS' LOAN AND TRUST COMPANY, AS  
TRUSTEE, SUCCESSOR OF THE MORTON TRUST COM-  
PANY, AS TRUSTEE,

*v.*

METROPOLITAN STREET RAILWAY COMPANY ET AL.

GUARANTY TRUST COMPANY OF NEW YORK

v.

METROPOLITAN STREET RAILWAY COMPANY ET AL.

THE FARMERS' LOAN AND TRUST COMPANY, AS  
TRUSTEE, SUCCESSOR OF MORTON TRUST COMPANY,  
AS TRUSTEE,

v.

METROPOLITAN STREET RAILWAY COMPANY ET AL.

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

**PETITION OF THE UNITED STATES FOR WRITS OF  
CERTIORARI.**

*To the Chief Justice and Associate Justices of the  
Supreme Court of the United States:*

The Solicitor General, on behalf of the United States, prays for writs of *certiorari* to review the judgments of the Circuit Court of Appeals for the Second Circuit in the above-entitled cases (*Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 774).

These cases involve the question whether, under section 38 of the corporation tax law, act of August 5, 1909, ch. 6 (36 Stat. 112), receivers of insolvent corporations, duly appointed by a court of equity, and subsequently carrying on the business of such corporations by order of the court, are required to make the return prescribed by paragraph 3 of said section 38; that is to say, is a corporation "doing business" when it is being operated by a receiver?

### STATEMENT OF FACTS.

Several street railroad companies were thrown into the hands of receivers by the Federal Court at New York in proceedings, either in the nature of creditors' bills or for foreclosure of mortgages. The orders appointing the receivers transferred to them, in the creditors' action, all the privileges, franchises, and assets of every kind of the corporations, and, in the mortgage foreclosure cases, all such privileges, etc., as were covered by the mortgages, and authorized the receivers to run, manage, and operate the railroads, and to discharge their public obligations; and the corporations and their officers and agents were enjoined from interfering with the receivers in said management. (*Pennsylvania Steel Company case*, Record, 24, Exhibit A, *Central Trust Company case*, Record, p. 25, Exhibit A.)

The receivers did, in fact, continue such operations during the years when returns under the corporation tax act were demanded of them. The lower courts held that the corporations were not engaged in or doing business and that the receivers did not have to make any returns under the corporation tax law.

### THE GENERAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

1. Exactly the same business was carried on after the appointment of the receiver as had been carried on before. There was the same "doing of

business." The receiver was certainly not doing the business as an individual. The business of the corporation was being carried on. It is simply a question of whether the corporation was doing the business within the meaning of the act.

2. In the practical administration of the corporation tax law it is important to know whether receivers of corporations are required to make returns or not. The corporation tax law is, in a sense, a new venture in the fiscal system of the country, and it is important that the fundamental principles governing it should be established by this court. Until this court settles this question there will be constant friction between the taxing officials of the Government on the one hand and the inferior Federal and State courts on the other. The conflict between the administrative officers of the United States and courts administering insolvent corporations should be avoided.

The taxing authorities are going to try to collect all the revenue they can, and there will be a tendency on the part of receivers and the Federal and State courts appointing them to avoid the tax, and to make as good a showing as possible in the administration of the properties.

3. There are numerous cases pending involving this question, and it seems to be of sufficient public importance to render it desirable in the public interests to obtain a decision of the court of last resort. Large sums of money which the Govern-

ment claims to be justly due it, and which lower courts are refusing to direct receivers to pay, are involved in the decision of this question.

For these reasons the writs of certiorari should issue.

**WM. MARSHALL BULLITT,**  
*Solicitor General.*  
**WM. C. HERRON,**  
*Attorney.*

FEBRUARY 5, 1913.

#### **BRIEF IN SUPPORT OF THE PETITION.**

There are two points involved in this case—namely:

*First.* Whether the receiver of an insolvent corporation to whom the property of the corporation, including all its franchises, is transferred, with authority to carry on its business to as full an extent in every way as the corporation itself could carry it on, is engaged in "the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described." (*Flint v. Stone Tracy Company*, 220 U. S. 107, 145, 146.)

*Second.* Whether, if such receiver be included within the scope of the act, he is excluded from its provisions by reason of the fact that the language of the act does not specifically refer to receivers.

## I.

Looking at the matter in a common-sense way, the receivers in these cases, having possession of all the property of every description of these corporations, being engaged in carrying on all the business for which the corporations were organized, including the performance of their public obligations, receiving all their income, and assuming the discharge of their financial obligations, were engaged in doing business with the advantages which inhere in corporate organizations. They were certainly not doing business as individuals. They were appointed in actions to which the corporations were parties, and the *sine qua non* of their appointment was the acquisition of jurisdiction over such corporations. The question whether or not the receivers got the so-called "primary" franchise of the corporations is immaterial, since the corporation tax act does not purport to tax that franchise. Nor is the extent of the property which will pass to a purchaser under the decree of sale material, for the act does not purport to tax the *property* in the receivers' hands. *The only question is, in what capacity were the receivers doing business?* It is submitted that they were doing the business of the defendant corporations in the sense intended by section 38 of the act of August 5, 1909. The Circuit Court brought the corporations before it by its compulsory process, seized their property and assumed charge of their business, and ordered the

corporations to refrain from the prosecution of their own business, and, while the court maintained this jurisdiction, and retained the corporations at its bar, the receivers, its officers, were engaged in carrying on the business of the defendants with all the advantages inhering in the corporations themselves. The common expression of business men correctly expresses the legal status. *The corporations have gone into the hands of receivers.*

Cases have arisen in New York, Pennsylvania, and New Jersey under taxing acts which were construed to tax the franchise or business of corporations, and in all those States it has been held that the liability still exists, although the corporations have been placed in the hands of receivers.

In *Central Trust Company v. New York City and Northern Railroad Company*, 110 N. Y. 250, the corporation tax act of the State of New York was considered, which was before this court in *Home Insurance Company v. New York*, 134 U. S. 594. In this latter case this court, speaking through Mr. Justice Field, said of the nature of the tax imposed, at pages 599, 600:

It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.



By the term "corporate franchise or business," as here used, we understand is meant \* \* \* the right or privilege given by the State to two or more persons of being a corporation: that is, of *doing business in a corporate capacity*, and not the privilege or franchise which, when incorporated, the company may exercise.

The courts of the State of New York have always adopted this same construction of the aforesaid act, and yet, in the case of the *Central Trust Company v. New York City and Northern Railroad Company*, *supra*, it was held that a receiver was liable for this tax. In the opinion delivered by Judge Peckham it was said (110 N. Y. 256, 257):

\* \* \* But we are of the opinion that the railroad when in the receiver's hands and operated by him, is operated under and by virtue of the franchise which has been conferred upon the corporation by the State, \* \* \*. Under this order of the court he takes possession of all the property of the corporation and proceeds to operate,—that is, to run its trains and to do all that was formerly done under the direction of the board of directors. In this way he uses the franchise which has been conferred by the State upon the company, and he uses it as an officer of the court which is administering the affairs of the company, and through the court he acts as the company to the same extent *pro hac vice* as if the board of directors were operating the railroad. It is the franchise which is being

used in both cases, only in one case it is used for the company, and substantially by it, by means of its board of directors, while in the other case the same franchise is being used and the road is operated under it by an officer of the court until, by virtue of the legal proceedings connected with the receivership, the receiver is discharged and the road returned to its former possessors, or other proceedings taken under a reorganization, as provided by law.

The same ruling was made in effect in the case of the *New York Terminal Company v. Gaus*, 204 N. Y. 512, 515, which arose under a later act laying a tax upon every corporation "for the privilege of doing business or exercising its corporate franchises in this State." In that case Judge Gray, delivering the opinion of the majority of the court, said the following:

\* \* \* As he had no individual interest, but only the official possession of the property, the receiver could only have operated under the corporate franchise. That he was not a general receiver, as in sequestration proceedings, but only a receiver of the mortgaged property, *pendente lite*, however marked the distinction, is not material to our consideration. \* \* \* Operation of the corporation business might have been enjoined; but from its continuance by the receiver, the legal presumption, of course, is that it was authorized. The corporation was not dissolved; its franchise to conduct the ferry business was in existence and any operation must

have been by virtue of that franchise. The right of its officers to operate was taken away, for the time, by the court and was conferred upon the receiver, as its officer. Operation therefore, could only have been under the corporate franchise and if so, then, I think that the right of the comptroller to levy a franchise tax attached and that the tax became a lien upon the corporate assets paramount to all prior incumbrances.

The cases in Pennsylvania arose under a statute levying a tax upon railroad companies based upon their gross receipts. This tax was thus described by the Supreme Court of Pennsylvania in *Philadelphia Contributionship for Insurance v. Commonwealth*, 98 Pa. St. 48, 53:

It is a tax on the corporate franchise of the plaintiff in error, measured by its net earnings. \* \* \* Its net earnings or income is resorted to simply as a just measure of the tax to be paid for *the enjoyment of its corporate franchise*.

The similar provision in the Federal war-revenue act of 1898 (30 Stat. 448), levying an excise tax upon every corporation doing the business of refining petroleum or sugar, based upon their gross receipts, was construed in the same manner by this court in *Spreckels Sugar Refining Company v. McClain*, 192 U. S. 397, 411, where the court said:

Clearly the tax is not imposed upon gross annual receipts as property, but only in respect to the carrying on or doing the business

of refining sugar. It can not be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts.

In *Philadelphia and Reading Railroad Company v. Commonwealth*, 104 Pa. St. 80, the lower court held that this tax must be paid, although the railroad had gone into the hands of a receiver, and the Supreme Court affirmed this decision.

The cases in New Jersey arose under a tax act which was thus construed by this court in *New Jersey v. Anderson*, 203 U. S. 483, 490, 493, as follows:

Without undertaking \* \* \* to harmonize the views expressed by different judges, we think the weight of judicial decision in that State favors the view that this is a tax imposed upon the right of the corporation to continue to be a corporation, with power to exercise its corporate franchises, based upon the amount of its capital stock issued and outstanding.

\* \* \* \* \*

We think then that, as denominated in the statute, this was a tax imposed by the State upon the corporation for the privilege of existence and the continued right to exercise its franchise.

In the cases of *Mather's Sons' Company's Case*, 52 N. J. Eq. 607, *Chesapeake and Ohio Railway Company v. Atlantic Transportation Company*, 62 N. J. Eq. 751, and *In re United States Car Company*, 60 N. J. Eq. 514, the Court of Errors and Appeals of New Jersey held that receivers were liable to pay this tax.

## II.

Though a tax act should be strictly construed as to the persons and subjects liable to the tax, there is no reason why provisions in such an act clearly applicable to corporations of a character such as that of the railroad companies in this case, and requiring returns to be made by certain officers of such corporations, should not be extended to cover receivers, who have possession of all the property of the corporation, including its books and records, and are in receipt of its income. The provisions in the corporation tax act in reference to the persons who are to make the return required thereunder were inserted for the protection of the Government, so that those officers of the corporation who, in the general nature of things, possess the information desired, should be specifically designated. If, however, a court of equity has intervened, and transferred the books and records of the corporation from the custody of its officers to the custody of an officer of said court, together with the management of the business of the corporation, and thus rendered the officers of the corporation powerless to give the required information as to the amount of its gross income, the amount of maintenance expenses, etc., the operation of the corporation tax act should not be defeated thereby. The words of the act must be interpreted reasonably, so as to place the burden of making the return upon that person who is, by law, in possession of the information desired.

In the cases cited, *supra*, from New York, Pennsylvania, and New Jersey, where receivers were held liable to pay certain corporation taxes, the taxing acts made no reference, in terms, to receivers, and yet the State courts did not consider this a valid objection to the application of the act to receivers.

Nor is the fact that the receiver is appointed on the ground that the corporation is insolvent any sufficient reason why he should not make a *return*. If such return fail to show the required net income, no tax accrues. On the other hand, it is common knowledge that corporations, though solvent, are forced into receiverships through the financial distress of affiliated companies, and also, that corporations apparently insolvent are sometimes so carefully managed by receivers as to rehabilitate their affairs. No reason of justice excuses such corporations from the payment of this tax, merely because a court of equity has placed their affairs temporarily in the hands of an officer of such court. This would be to put the Federal Government in a worse position than the other creditors of the corporation, contrary to the general rule of the law.

**WM. MARSHALL BULLITT,**

*Solicitor General.*

**WM. C. HERRON,**

*Attorney.*

FEBRUARY 5, 1913.



466 467

No. 933

**In the Supreme Court of the United States**

October Term, 1912

**THE UNITED STATES PETITIONER,**

**FREDERICK W. WERTIDGE, AS RECEIVER, ETC., VS.**

**THE UNITED STATES PETITIONER,**

**ADRIAN H. JOHNS AND DOUGLAS ROBINSON, AS  
RECEIVERS, ETC.**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT**

**MOTION TO ADVANCE**

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1912





# In the Supreme Court of the United States.

OCTOBER TERM, 1912.

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THE UNITED STATES, PETITIONER, v. FREDERICK W. WHITRIDGE, AS RECEIVER, etc., et al.	}	No. 983.
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THE UNITED STATES, PETITIONER, v. ADRIAN H. JOLINE AND DOUGLAS ROB- inson, as receivers, etc.	}	No. 984.
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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## MOTION TO ADVANCE.

The Attorney General, on behalf of the United States, moves to advance the above-entitled cases for hearing at the next term of this court.

These cases involve the question whether, under Section 38 of the Corporation Tax Law of August 5, 1909, receivers of insolvent corporations, duly appointed by a court of equity, and subsequently carrying on the business of such corporations by order of the court, are required to make the return prescribed by paragraph 3 of said Section 38.

The question involved is evidently one of great importance to the Internal Revenue Department in the administration of the Corporation Tax Act, in view of the many large railroad and other receiverships which often continue for a period of several years, and which at times result, when so conducted by the receivers, in a net income which would be subject to taxation if the corporations had themselves through their own officers and directors conducted the business.

There are many cases of this kind involving a considerable amount of revenue, and the case is therefore one which should be determined as soon as possible by the highest authority.

Opposing counsel concur.

JAMES C. McREYNOLDS,  
*Attorney General.*

WILLIAM R. HARR,  
*Assistant Attorney General.*

APRIL 7, 1913.



Wm. Brown, Secy. & A.  
PUBLISHED

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JAMES W. McKENNEY,

Nov. 400 and 407

# Joint Report of the United States

General Term, 1898

The United States Department of

Frederick W. Whitcomb as Receiver of the  
Third Avenue Railroad Company, et al.

The United States Department of

Adrian H. Collins and Douglas Robinson as  
Receivers of the New York and New Jersey  
Railway Company, et al.

of the 1st of January, 1898, to the 31st of December, 1898, and  
of the 1st of January, 1899, to the 31st of December, 1899.

STATE OF NEW YORK OF THE UNITED STATES



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# In the Supreme Court of the United States.

OCTOBER TERM, 1913.

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THE UNITED STATES, PETITIONER, v. FREDERICK W. WHITRIDGE, AS RECEIVER of the Third Avenue Railroad Company et al.	}	No. 466.
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*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.*

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## BRIEF ON BEHALF OF THE UNITED STATES.

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### STATEMENT OF THE CASE.

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The defendant companies are corporations organized under the laws of the State of New York for the purpose of building, maintaining, and operating street railroads in the city of New York. (Rec., 466, pp. 9, 33; Rec., 467, pp. 6, 29, 30.) The suits in which the Third Avenue Railroad Co. and the Metropolitan Street Railway Co. are named as defendants

were brought to foreclose mortgages. The other suits were brought by general creditors.

The proceedings are fully set forth *In re Metropolitan Railway Receivership* (208 U. S., 90, 93-96).

Prior to the year 1909 a receiver or receivers had been appointed in each of the above-entitled suits; in the foreclosure suits, of the property covered by the mortgage being foreclosed; and in the general creditors' suits, of all the property of the defendants.

The orders appointing the receivers transferred to them, in the creditors' action, all the privileges, franchises, and assets of every kind of the corporations, and, in the mortgage-foreclosure cases, all such privileges, etc., as were covered by the mortgages, and authorized the receivers to run, manage, and operate the railroads, and to discharge their public obligations; and the corporations and their officers and agents were enjoined from interfering with the receivers in said management. (Rec., 466, p. 13, Exhibit A; Rec., 467, p. 11, Exhibit A.)

The receivers did, in fact, continue such operations during the years when returns under the corporation-tax act were demanded of them. The lower courts held that the corporations were not engaged in or doing business and that the receivers did not have to make any returns under the corporation-tax law.

#### QUESTIONS PRESENTED.

1. When a corporation is brought into a court of equity at the suit of a creditor or mortgagee, and that court in the exercise of the jurisdiction so ac-

quired appoints a receiver of all its assets, including its franchises, and authorizes the receiver to carry on all its business, which is done, is that corporation, while thus in the hands of a receiver, doing business "with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described"? (*Flint v. Stone Tracy Company*, 220 U. S., 107, 145, 146.)

2. If such corporation is doing business, is the receiver obliged to make the return provided for in section 38 of the act of August 5, 1909 (36 Stat., 112)?

#### I.

**Such corporation is doing business within the meaning of the corporation-tax act.**

It must be admitted that the business of operating surface cars as common carriers for hire over the lines of the companies was being carried on during the period of the receivership by somebody, and, of course, it must be assumed that it was being carried on lawfully. Who, then, of all the world could carry on that business lawfully during those years? Clearly nobody but the companies. They had received charters under the statutes of the State of New York which authorized a certain number of persons to "become a corporation, for the purpose of building, maintaining, and operating a railroad," and required a certificate of "the names and descriptions of the streets, avenues, and highways on which the road is to be constructed." (See General Laws N. Y., Birdseye, 3 ed.; Railroad Law, sec. 2.) The defendant

companies acquired therefore from the State a franchise, not merely to be corporations, as seems to be claimed by their counsel, but to be corporations for the purpose of operating street railroads over certain streets. By virtue of this franchise they purchased equipment, occupied certain streets, and engaged in the business of operating street railroads. When brought into court in these proceedings in the exercise of a jurisdiction which absolutely required their presence, they came in with their full corporate capacity including this franchise from the State to be railroad corporations of a certain character. In the strict exercise of its jurisdiction thus acquired by the presence of the corporations at its bar, the court appointed receivers for all their assets, including all their franchises and privileges, and the receivers proceeded under this order of court to carry on the business of running street cars on the streets of New York. Again, it must be inquired, Who was carrying on this business if not the corporations? The receivers could not lawfully do so, either as individuals or as officers of the court. The court itself could not do so, except by virtue of the jurisdiction it acquired over these corporations having these franchises which alone made such business lawful or possible. It follows, by the method of exclusion, that it was the corporations who were carrying on the business. They still retained the legal title to all the property, and the court merely assumed supervision of their business for the benefit of their creditors, and ulti-

mately of themselves and their stockholders, by putting in possession its receiver.

If the corporations themselves are not doing business under such circumstances, how could such a suit as that of *Morrison v. Forman* (177 Ill., 427) be sustained where a corporation *by its receiver* was permitted to condemn property? And since the defendant companies are public-service corporations, if they really ceased to carry on their public functions when receivers were appointed, it would appear to have been the duty of the State to forfeit their charters. But would any court have sustained quo warranto proceedings against them? To such a suit they would certainly answer that they were still performing their public duties through the receivers.

The argument of counsel, based upon a distinction between the primary franchise to be a corporation and the secondary franchise to operate a street railroad on certain streets of New York, is unsubstantial in its application to the case at bar. No franchise merely to be a corporation was ever granted to these companies. Their primary franchise was to be corporations of a certain character, namely, street railroad companies, with certain powers, namely, to maintain and operate street cars on certain streets of New York City. The companies, of course, may have subsequently acquired other franchises as they acquired property of all sorts, but such so-called secondary franchises they acquired, and could only acquire, pursuant to the powers conferred upon them by their original charter. A corporation can

not, any more than a natural person, be dissected and live. It is one organic whole, and it is this whole which was before the court in these proceedings and it is this whole over which the court assumed control by its receivers.

It is said that the corporations are not within the act because its terms are not applicable to the situation existing when corporations are in the hands of receivers. This claim is made on the theory that the terms "gross income," "net income," "expenses of maintenance," "interest on its bonded or other indebtedness," "amounts received by it as dividends," all refer explicitly to the corporation itself and can not be made to fit the case of a receiver. But it is submitted that in every substantial sense the income received and disbursements made by the receiver are those of the corporation itself. The receiver takes the income as a trustee, applies it first to the debts of the corporation, and holds the surplus for the corporation. Any net income over and above the expenses, debts, etc., is the equitable property of the latter. In *Philadelphia & Reading R. R. Co. v. Commonwealth* (104 Pa. St., 80, 82, 83) the same argument was advanced on behalf of the company as is made here, and it was thus answered by the lower court in an opinion adopted by the Supreme Court:

It is argued by the able and ingenious counsel of the defendant, that the taxability or otherwise of the gross receipts depends upon the relation of the taxing Act of those into whose hands they come; in other words,

that the expression "gross receipts of said company" means the gross amount received by said company, and that, as the company, as such, received nothing, it had no gross receipts. We do not so understand the Act. *As we construe it, "gross receipts" is equivalent to "gross increase" or "gross earnings," and we think that their origin and ownership, rather than the hands into which they come, must be considered in determining the question whether they are taxable or not.*

How then did these gross receipts accrue, and to whom did they really belong? The franchise and privileges, the railroads and canals, the property of every kind, real and personal, though exercised, operated, and used by the receivers, were owned by the corporation defendant. *It was, then, the exercise, operation, and use of the property of defendant that produced the gross receipts, and these went into the hands of the receivers, simply because they were receivers of the property and assets of the defendant. Their appointment gave them—so far as this case is concerned—no right to take any gross receipts that did not belong to defendant. They were acting for it, and at its expense, and not for themselves, and the product of the exercise and use of its franchises and property belonged to it as much as the franchises and property themselves. The only difference is that had the receivers not been appointed, the officers of the defendant would have been free to apply the receipts to such of its uses as they thought best, whereas the receivers will apply them to such of its uses as*



the court may direct. In either case they are used for the benefit of the defendant.

It may be said that the liabilities of the receiver are not the liabilities of the corporation and therefore it can not be the corporation which is carrying on the business, but this is true in only a limited sense. The corporation is not liable in a personal action, but a debt may exist without any such liability, as is shown by the early history of the pledge. The fact remains that the liabilities of the receiver are paid, not out of his own pocket, but out of the assets of the corporation, and in some cases they are made an express lien on its property. This shows that they are in a substantial, practical sense, leaving out of view any question of remedies, the liabilities of the corporation.

The Court of Appeals of New York has, in three cases, expressly construed a taxing statute in substantially all respects similar to the corporation-tax act as covering corporations in the hands of receivers.

In *Central Trust Company v. New York City and Northern Railroad Company* (110 N. Y., 250), the corporation-tax act of the State of New York was considered, which was before this court in *Home Insurance Company v. New York* (134 U. S., 594). In this latter case this court, speaking through Mr. Justice Field, said of the nature of the tax imposed, at pages 599, 600:

It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock.

The statute designates it a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

By the term "corporate franchise or business," as here used, we understand is meant \* \* \* the right or privilege given by the State to two or more persons of being a corporation; that is, of *doing business in a corporate capacity*, and not the privilege or franchise which, when incorporated, the company may exercise.

The courts of the State of New York have always adopted this same construction of the aforesaid act, and yet, in the case of the *Central Trust Company v. New York City and Northern Railroad Company*, *supra*, it was held that a receiver was liable for this tax. In the opinion delivered by Judge Peckham it was said (110 N. Y., 256, 257):

\* \* \* But we are of the opinion that the railroad when in the receiver's hands and operated by him, is operated under and by virtue of the franchise which has been conferred upon the corporation by the state, \* \* \*. Under this order of the court he takes possession of all the property of the corporation and proceeds to operate, that is, to run its trains and to do all that was formerly done under the direction of the board of directors. In this way he uses the franchise which has been conferred by the state upon the company, and he uses it as an officer of the

court which is administering the affairs of the company, and through the court he acts as the company to the same extent *pro hac vice* as if the board of directors were operating the railroad. It is the franchise which is being used in both cases, only in one case is it used for the company, and substantially by it, by means of its board of directors, while in the other case the same franchise is being used and the road is operated under it by an officer of the court until, by virtue of the legal proceedings connected with the receivership, the receiver is discharged and the road returned to its former possessors, or other proceedings taken under a reorganization, as provided by the law.

In *People ex rel Joline and Robinson as Receivers v. Williams* (200 N. Y., 528), the same receivers who are before this court in No. 467 by the same counsel as appear here, made the same argument as in this case against the applicability of the New York law, but the Court of Appeals overruled their claim on the authority of *Central Trust Company v. New York City and Northern Railroad Company*, *supra*.

The same ruling was made in effect in the case of the *New York Terminal Company v. Gaus* (204 N. Y., 512, 515), which arose under a later act laying a tax upon every corporation "for the privilege of doing business or exercising its corporate franchises in this State." In that case Judge Gray, delivering the opinion of the majority of the court, said the following:

\* \* \* As he had no individual interest, but only the official possession of the property, the receiver could only have operated under the corporate franchise. That he was not a general receiver, as in sequestration proceedings, but only a receiver of the mortgaged property *pendente lite*, however marked the distinction, is not material to our consideration. \* \* \* Operation of the corporation business might have been enjoined; but from its continuance by the receiver, the legal presumption, of course, is that it was authorized. The corporation was not dissolved; its franchise to conduct the ferry business was in existence and any operation must have been by virtue of that franchise. The right of its officers to operate was taken away, for the time, by the court and was conferred upon the receiver, as its officer. Operation, therefore, could only have been under the corporate franchise, and if so, then, I think that the right of the comptroller to levy a franchise tax attached and that the tax became a lien upon the corporate assets paramount to all prior incumbrances.

It is claimed that this case was decided by a bare majority, and that the minority opinion is preferable, but it is clear that Cullen, C. J., who delivered the main dissenting opinion, did not claim that the tax was not validly imposed, but merely that it was not entitled to a preference over mortgage liens, while Chase, J., concurring with Cullen, C. J., expressly

stated that the tax was properly imposed. (204 N. Y., 523.)

It is, of course, true that the decisions of State courts are not binding on this court on the question whether a Federal tax has been validly imposed or not, but it is submitted that they are authoritative, or at any rate of great weight, on the nature of the relationship existing under State laws between a receiver and a corporation incorporated under those laws, and on the question whether such a corporation, though in the hands of a receiver, is still doing business under its State charter.

## II.

### **The receivers must make the return provided for in the corporation-tax act.**

The Circuit Court of Appeals, in holding that receivers need not make the return, put its decision on the principle that a taxing act must be strictly construed. This is true as to the persons and subjects which are claimed to be within the act, but is not true as to administrative details. In the previous argument we have demonstrated, it is hoped, that the defendant corporations are clearly within the act. That being so, the provisions of the act as to what person shall make the return on its behalf are purely administrative and should receive a beneficial rather than a strict construction. The provisions in the corporation-tax act in reference to the persons who are to make the return required thereunder were

inserted for the protection of the Government, so that those officers of the corporation who, in the general nature of things, possess the information desired, should be specifically designated. If, however, a court of equity has intervened and transferred the books and records of the corporation from the custody of its officers to the custody of an officer of said court, together with the management of the business of the corporation, and thus rendered the officers of the corporation powerless to give the required information as to the amount of its gross income, the amount of maintenance expenses, etc., the operation of the corporation-tax act should not be defeated thereby. The words of the act must be interpreted reasonably, so as to place the burden of making the return upon that person who is, by law, in possession of the information desired.

In the cases cited, *supra*, from New York and Pennsylvania, where receivers were held liable to pay certain corporation taxes, the taxing acts made no reference, in terms, to receivers, and yet the State courts did not consider this a valid objection to the application of the act to receivers.

Nor is the fact that the receiver is appointed on the ground that the corporation is insolvent any sufficient reason why he should not make a *return*. If such return fail to show the required net income, no tax accrues. On the other hand, it is common knowledge that corporations, though solvent, are forced into receiverships through the financial distress of affili-

ated companies, and, also, that corporations apparently insolvent are sometimes so carefully managed by receivers as to rehabilitate their affairs. No reason of justice excuses such corporations from the payment of this tax, merely because a court of equity has placed their affairs temporarily in the hands of an officer of such court. This would be to put the Federal Government in a worse position than the other creditors of the corporation, contrary to the general rule of the law.

It is respectfully submitted that the decrees of the court below should be reversed.

SAMUEL J. GRAHAM,

*Assistant Attorney General.*

OCTOBER, 1913.





No. ~~988~~ and ~~984~~

In the Supreme Court of the United States.

CENTRAL TRUST COMPANY OF NEW YORK

*against*

THE THIRD AVENUE RAILROAD COMPANY AND OTHERS.

AND THREE OTHER CASES.

THE PENNSYLVANIA STEEL COMPANY

*against*

NEW YORK CITY RAILWAY COMPANY.

AND THREE OTHER CASES.

IN THE MATTER

*of*

THE APPLICATION OF THE UNITED STATES OF AMERICA FOR ORDERS DIRECTING THE RECEIVERS HEREIN TO MAKE AND FILE RETURNS UNDER THE CORPORATION TAX LAW OF THE NET INCOME OF THE CORPORATIONS OF WHICH THEY WERE APPOINTED RECEIVERS.

BRIEF ON BEHALF OF THE RESPONDENTS WHITRIDGE, JOLINE AND ROBINSON AND LADD, AS RECEIVERS, IN OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI.

EVARTS, CHOATE & SHERMAN,

*Solicitors for Respondent WHITRIDGE as Receiver.*

MASTEN & NICHOLS,

*Solicitors for Respondents JOLINE and ROBINSON as Receivers.*

DEXTER, OSBORN & FLEMING,

*Solicitors for Respondent LADD as Receiver.*

HERBERT J. BICKFORD,

ARTHUR H. MASTEN,

MATTHEW C. FLEMING,

*Counsel.*

Office Supreme Court, U.  
FILED.  
FEB 27 1913  
JAMES H. McKENN  
CL



**In the Supreme Court of the United States.**

OCTOBER TERM, 1912.

CENTRAL TRUST COMPANY OF NEW YORK

v.

THE THIRD AVENUE RAILROAD COMPANY, ET AL.

AMERICAN HAY COMPANY

v.

DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY.

THE BARBER ASPHALT PAVING COMPANY

v.

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS  
AVENUE RAILWAY COMPANY.

THE LORAIN STEEL COMPANY

v.

UNION RAILWAY COMPANY OF NEW YORK CITY.

THE PENNSYLVANIA STEEL COMPANY ET AL.

v.

NEW YORK CITY RAILWAY COMPANY.

THE FARMERS' LOAN AND TRUST COMPANY, AS TRUSTEE, SUCCESSOR  
OF THE MORTON TRUST COMPANY, AS TRUSTEE,

v.

METROPOLITAN STREET RAILWAY COMPANY ET AL.

GUARANTY TRUST COMPANY OF NEW YORK

v.

METROPOLITAN STREET RAILWAY COMPANY ET AL.

THE FARMERS' LOAN AND TRUST COMPANY, AS TRUSTEE, SUCCESSOR  
OF MORTON TRUST COMPANY, AS TRUSTEE,

v.

METROPOLITAN STREET RAILWAY COMPANY ET AL.

**BRIEF ON BEHALF OF WHITRIDGE, JOLINE  
AND ROBINSON AND LADD AS RECEIV-  
ERS, IN OPPOSITION TO THE PETITION  
OF THE UNITED STATES FOR WRITS OF  
CERTIORARI.**

The Solicitor General, on behalf of the United  
States, has petitioned this Court for writs of *certi-*

*orari* to review the decisions of the Circuit Court of Appeals for the Second Circuit (198 Fed., 774), which affirmed decrees of the District Court denying the petitions of the United States for orders to compel the respective receivers of the defendant corporations to make return for the years 1909 and 1910 of the net income for those years of said companies, pursuant to section 38 of the corporation tax law, Act of August 5, 1909, chapter 6 (36 Stat., 112).

The only question involved in the decision which the petitioner seeks to review is whether receivers of the property of corporations, appointed by a court of equity in foreclosure or general creditors' suits, are required to make the return which the Act provides shall be made by corporations under oath of their officers. The question is a simple one, dependent wholly upon the construction of the statute and the application of well established rules of law. The Act has been exhaustively and minutely considered and construed by this Court in *Flint v. Stone Tracy Co.*, 220 U. S., 107, and other cases decided at the same time.

These are causes where jurisdiction is dependent entirely upon diversity of citizenship, and this controversy arises under the revenue laws, and the Judicial Code contemplates that the judgments of the Circuit Court of Appeals shall be final. We know of no decision which conflicts with them, and none is referred to in the petition. They are not extraordinary nor of peculiar gravity or general importance. We do not understand that the pendency of numerous cases involving the same point has ever been recognized as ground for the issue of a writ of *certiorari*. The decisions which the petitioner seeks to review are not open to misconstruction; and, if the Government gives to them the faith and credit to which they are entitled, the numerous pending suits will be disposed of, and all cause for the conflict between administrative officers and courts administering insolvent estates, which is re-

ferred to in the petition, will be removed. These are matters wholly within the control of the Government.

#### STATEMENT.

Each of the above named defendants is a street surface railway corporation organized under the laws of the State of New York. The suits in which The Third Avenue Railroad Company and Metropolitan Street Railway Company are named above as defendants were brought to foreclose mortgages. The other suits were brought by general creditors. A brief history of the inception of the receiverships will be found in *Re Metropolitan Railway Receivership*, 208 U. S., 90. Prior to the year 1909, a receiver or receivers had been appointed in each of the above entitled suits; in the foreclosure suits, of the property covered by the mortgages being foreclosed; and, in the general creditors' suits, of all the property of the defendants. The order in each case authorized and directed the receivers to take possession of the railroads, franchises and other property of which they were appointed receivers, and to run, manage and operate the railroads and properties, and to collect the income thereof; and directed the officers and agents of the corporations to turn over and deliver to the receivers all property in their hands or under their control; and enjoined the corporations, their officers, directors, agents and employees and all other persons whomsoever from interfering in any way whatsoever with the possession or management of any part of the property over which the receivers were appointed.

During the whole of the years 1909 and 1910 these receivers were in the exclusive control and operation of the properties under these orders.

Each corporation, by its proper officers, made return for the year 1909 under the act in question, in which it was stated in substance that the property

of the corporation was in the hands of receivers who were in charge of its operations, and some of them also stating that they had received no income whatsoever during that year. Under instructions of the court, the receivers have made no returns (*Pennsylvania Steel Company v. New York City Railway Company*, 176 Fed., 471, 477).

In 1911, the United States filed petitions in the above entitled causes, praying for orders directing the receivers to make returns for the years 1909 and 1910. The Circuit Court denied these petitions (193 Fed., 286), and an appeal was taken to the Circuit Court of Appeals, which affirmed the orders appealed from (198 Fed., 774).

During the period of nearly two years which has elapsed since the Government filed its petitions, the District Court, in conformity with the views expressed in *Re Metropolitan Railway Receivership* (208 U. S., 90, 111, 112) that its possession of the property through its receivers should not be unnecessarily prolonged, has divested itself of possession and operation, through sale or otherwise, in all of the suits, except that in which the Dry Dock Company is defendant. In the Third Avenue, Forty-second Street and Union suits, the receiver has finally accounted and has been discharged. In the other suits claims to the proceeds of sale and funds in the hands of the receivers are being liquidated as fast as practicable.

## FIRST POINT.

**The act in question imposes a tax upon corporations for the privilege of doing business by them in their corporate capacities, based upon the net income received by them. If they do no business, they are not subject to the tax. The act does not apply to receivers of corporations.**

### *(a) Provisions and construction of the Act.*

Section 38 of the Act (36 Stat. L., 112) provides (p. 112) "That *every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory,*" "shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year." The Act further provides that such net income shall be ascertained by deducting from the gross income "of such corporation" expenses of maintenance and operation, losses, interest actually paid on "its bonded or other indebtedness," all sums "paid by it for" taxes, and amounts "received by it" as dividends upon stock of corporations subject to the tax (p. 113); that the tax shall be computed upon the remainder (after deducting \$5,000) of the net income "of such corporation," and that on or before March 1, "a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the cor-



porations," setting forth the total amount of the paid up capital stock, bonded and other indebtedness and gross income "of such corporation," and amount of dividends "received by such corporation" (pp. 114-5). Subdivision Fourth (pp. 115-6) provides for obtaining further information if the return "made by any corporation" is incorrect, by an examination of books, or attendance and examination "of any officer or employee of such corporation." Subdivision Fifth (p. 116) provides for penalties, and that all assessments shall be made and "the several corporations . . . shall be notified of the amount for which *they* are respectively liable." Subdivision Eighth (p. 117) provides that if "any of the corporations . . . shall refuse or neglect to make a return . . . or shall render a false or fraudulent return, such corporation . . . shall be liable to a penalty."

This court has held that the tax imposed by this Act is not a tax upon property, or franchises, or business, or income; but that it is a tax upon the privilege of doing business in a particular manner, namely, in a corporate capacity. If business is not done in a corporate capacity, no tax is payable.

*Flint v. Stone Tracy Co.*, 220 U. S., 107.

Even if a corporation actually receives income but does not do business, no tax is payable.

*Zonne v. Minneapolis Syndicate*, 220 U. S., 187.

*Mine Hill & S. H. R. Co. v. McCoach*, 192 Fed. Rep., 670.

It is also clear that if the corporation receives no income, it is not liable for the tax.

(b) *The act clearly shows on its face that Congress only had corporations in mind, and not their receivers.*

There is nothing in the Act which indicates that Congress intended to impose a tax upon receivers

of corporations. Receivers are nowhere mentioned in it. The Act imposes a tax and severe penalties for the violation of the Act. It should be strictly construed, and cannot be enlarged by construction to embrace persons or property not clearly intended to be taxed.

In *United States v. Harris*, 177 U. S., 305, 309, it was held that receivers were not included in the word "company" in the Act of Congress to prevent cruelty to animals while in transit, and that the act did not apply to receivers.

The Act imposes the tax upon the doing of business "by such corporation," measured by the income received "by it," and requires the return to be made by and under the oaths of certain specified *officers of the corporation*. It requires that the return shall state the income received and the specified payments made thereout by the corporation. This requirement would not be met by a return by a receiver of income received and disbursements made by him. He could not include within these headings his receipts and disbursements, nor could the officers of the corporation include in their return the receipts and disbursements of the receiver.

## SECOND POINT.

**The Receivers did the business of operating these railroads and received all the income thereof. The corporations did no business and received no income.**

(a) *As matter of fact, none of these corporations did any business or received any income during the years 1909 and 1910.*

During the years 1909 and 1910 the receivers had exclusive possession of the property of these cor-

porations, and did and carried on all the business in respect thereof, and received all the income therefrom; and the corporations did no business, and received no income in respect of such property. This was in compliance with the orders which appointed them, and which enjoined the corporations from interfering in any way whatsoever with the possession or management of any part of the property over which the receivers were appointed. The property and the income were *in custodia legis*. The orders appointing the receivers changed the possession as well as the subsequent control and management of the property and tied the hands of the corporations in respect thereto (High on Receivers, 4th ed., § 15). It is not claimed that these corporations have violated the injunctions.

The tax is payable only in the event that the corporations did business, and also received net income in excess of \$5,000. If they did no business; or, if they did business, but received no income; or, if they did no business, but received income; they are not, in any such case, liable for the tax.

The petitioner does not claim that the corporations themselves did any business or received any income; but claims that the receivers' operations and income are within the statute, upon the theory that the receivers exercised the franchises of these corporations, or must be deemed to have taken the place of the officers of the corporations.

We submit, however, that the Act applies only to an actual, not a theoretical, exercise of franchises; and to income actually received by the corporation as the result of its corporate activity (*Zonne case, supra*). The very object in appointing receivers is to take away from the corporations and their officers the possession and operation of their property and the receipt of the income therefrom. Therefore, it cannot be said that the corporations carried on the business done by the receivers, or received the income received by them.

The duties and functions of receivers and their re-

lation to the corporation are far different from those of officers. The primary duty of receivers is to preserve the property as a trust fund for the benefit of those who may be adjudged to have an interest in it. Operation of the property is merely incidental. Officers and directors manage it for the benefit of the corporation, and may mortgage and sell it, and declare dividends and do many other things which receivers may not do.

There is seldom any income arising during a receivership to be turned over to the corporation; but it is immaterial whether these corporations subsequently receive income which accrued during the years 1909 and 1910 or not; for the tax is imposed, not upon what a corporation may receive or be entitled to receive in the future, but upon the income actually "received *by it*" during the year for which the tax is levied. The Act contemplates that the return shall be made upon the basis of money actually received and disbursements actually made during the current year (*Mutual Benefit Life Ins. Co. v. Herold*, 198 Fed., 199, 216). None of these corporations received any income for the years 1909 and 1910. If any of the receivers' income should come to the corporations it would not be through their activity, and they would not be taxable (*Zonne case, supra*).

(b) *Corporate franchises, the exercise of which is taxable.*

A corporation carrying on a business is subject to the tax, while an individual or co-partnership carrying on the same character of business is not subject to the tax. Individuals owning and operating a street railroad would not be taxable, although their operation of the railroad would involve the exercise of franchises, that is, the right to use public streets for railroad purposes. Such franchises, (which we shall refer to as secondary franchises) may be granted to an individual, and an

"individual as well as a corporation may operate a railroad" (*People v. Erie Railroad Company*, 193 N. Y., 369, 375). Most of the secondary franchises of these companies were originally granted to individuals. (e. g., Chap. 512, Laws of 1860. Chap. 825, Laws of 1873. Chap. 361, Laws of 1863.) Such franchises cannot now be granted to individuals in the City of New York (Railroad Law, § 93); but railroad corporations may mortgage their franchises, and they may be sold to and exercised by individuals. (*People ex rel. Third Avenue R. Co. v. Public Service Commission*, 203 N. Y., 299, 308, which involved the sale, in one of the above entitled suits, of the property and franchises of the Third Avenue Company.)

The corporate franchise, that is, the right to do business in a corporate capacity, is wholly distinct from secondary franchises. The corporate franchise is personal in character and inalienable, and exists only during the life of the corporation. On the other hand, secondary franchises are alienable, and may exist wholly apart from a corporate franchise, and may continue after the corporation and corporate franchise have been destroyed. Railroads are operated by virtue of secondary franchises.

If, therefore, the Act imposes a tax, not upon a railroad business, but upon the doing of such business in a corporate capacity, it is clear that the only franchise the exercise of which is taxable is the corporate franchise. The right to do business in a corporate capacity has many advantages, and is a valuable right. It is only the exercise of this right that Congress intended to tax.

(c) *The Receivers never possessed or exercised the corporate franchises of these corporations.*

The corporate franchises are inalienable. The corporations could not mortgage them. Creditors could not reach them. The Court could only take such property and rights as the creditors were entitled to have applied to the payment of their debts. It could not vest corporate franchises in its

receivers. The receivers could not exercise them. How could they act in a corporate capacity? They acted as individuals, not as corporations or through corporate forms or agencies. They were the arm of the Court, acting under the orders appointing them, and not servants of the corporations. The corporations still existed, their corporate franchises were unimpaired. They retained entire control over their corporate action and agencies. They could act as freely as before the appointment of the receivers, except in so far as they were enjoined from interfering with the receivers' possession and the performance of their duties. This was not a limitation or deprivation of corporate power. The corporations were merely deprived of possession of certain property, and could not exercise their corporate powers in respect thereof. The receivers had no control over them.

The cases at bar are far different from the case of a statutory receiver, where the corporation has been dissolved and all its property and powers vested in a statutory receiver. Chancery receivers do not represent the corporation in its individual or personal character, nor supersede it in the exercise of its corporate powers, except so far as the property intrusted to their care is concerned. Notwithstanding their appointment the corporations were clothed with their franchises and still existed. They could still exercise their powers if thereby they did not interfere with the management of the railroads. They could do many corporate acts and could do all things necessary to preserve their legal existence, could sue and be sued, and were liable for their acts and upon their contracts and covenants the same as if the receivers had not been appointed.

*Decker v. Gardner*, 124 N. Y., 334.

The Court could, in a foreclosure or general creditors' suit, take possession of the secondary franchises and the receivers could exercise them.

*Memphis, etc., R. Co. v. Commissioners*,  
112 U. S., 609, 619.

The possession of the railroads by the receivers gave them the power to operate them and exercise the secondary franchises which were inseparable from them. To do this they did not require and did not exercise any corporate franchises. They merely did, in their capacity as receivers, what individuals might do.

*People ex rel. Third Avenue R. Co. v. Public Service Commissioners*, 203 N. Y., 299, 308.

In respect to making the returns required by the Act of 1909, the corporations did all that was within their power to do. The returns were as complete as they were capable of making them. If the petitioner had any reason for dissatisfaction, the statute gives ample remedies. The statute does not require receivers to make returns.

*(d) Imposition of the tax on receivers might result in a heavier tax on bankrupt estates than on going concerns for the same volume of business.*

The application of this statute to receiverships might in most instances require larger tax payments out of the property than if the same property were in the possession of the corporation. For the purpose of ascertaining the net income which is the measure of the tax, deductions are to be made from the gross income, among other things, for expenses "*actually paid within the year out of income*," for maintenance and operation, and "*interest actually paid within the year on its bonded or other indebtedness*." During a receivership interest is seldom paid except upon the receivers' obligations and prior liens, although the funds in hand may be sufficient to pay interest on at least some of the other indebtedness. On the other hand, corporations would almost invariably pay their interest to the full extent of their net income, and, unless hopelessly insolvent, would borrow money to pay the rest.



Again, receivers are often compelled to borrow money. Would they be entitled to deduct interest on these debts, as being interest paid on "its [the corporation's] indebtedness"? The debts of the receiver are not debts of the corporation, but are obligations incurred by the court for the payment of which it imposes a charge upon the property in its possession. Again, the large expense of a receivership for fees of receivers, counsel, masters, etc. (unlike salaries of officers and fees of counsel of a going corporation, which are paid out of income as they accrue), are not usually paid until the termination of the receivership, and then usually out of the funds in the possession of the Court, whether arising from income or the sale of the property. Thus, deductions being allowed only for payments actually made or actually made out of income, during the year, a going concern might, and usually would, be entitled to larger deductions than a receiver, although the gross income in each case might be the same. It is not conceivable that Congress ever intended any such anomaly.

### THIRD POINT.

#### **Appellant's cases distinguished.**

To examine in detail each case cited in the petitioners' brief would unduly prolong this brief. As the Court below said, quoting from the opinion of LACOMBE, J.:

"When it is conceded, as it must be under *Flint v. Stone Tracy Co.*, 220 U. S., 107, that this tax is not imposed upon the property nor upon the franchises under which the railroad is operated in the different streets and avenues, most of the cases cited by the government become inapplicable."

*In re Mather's Sons' Co.*, 52 N. J. Eq., 607, *Chesapeake & Ohio R. Co. v. Atlantic Transportation Co.*, 62 N. J. Eq., 751, and *Re United States Car Co.*, 60 N. J. Eq., 514, the tax, as was stated in the case last cited, was

“an arbitrary imposition laid upon the corporation, without regard to the value of its property or its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence.”

In *Philadelphia, etc., R. Co. v. Commonwealth*, 104 Pa. St., 80, the act provided that every railroad corporation “owning, operating or leasing . . . any railroad . . . shall pay . . . a tax . . . upon the gross receipts of said company for tolls or transportation.” The Court held that the fact that the corporation was in the hands of receivers did not relieve the corporation from liability for the tax. The receivers were not parties to the action, and the question of their obligation to make the return required by the statute or pay the tax was not involved.

*New York Terminal Co. v. Gaus*, 204 N. Y., 512, was decided by a divided Court. So far as appears from the opinions, the only question involved was whether taxes under Section 182 of the New York Tax Law were liens on the property sold at foreclosure, prior to the lien of the mortgage.

We submit that the majority opinion failed to distinguish between a tax on a franchise, and a tax on the privilege of exercising a franchise; and also failed to distinguish between a corporate franchise and a secondary franchise; and incorrectly stated the character of the franchise exercised by a receiver of mortgaged property or in insolvency. The opinion of Cullen, *Ch. J.*, in which two of his associates concurred, clearly and correctly makes these distinctions. He says (p. 519):

“A franchise tax is of an entirely different character from a tax on property. . . .

It is levied *on the corporation* for the privilege, as the statute declares, of carrying on its business in a corporate or organized capacity (Tax Law, Secs. 182, 184); not of doing business, *but of doing business in a corporate capacity*. . . . The decision below seems to have proceeded on the ground that the right to run a ferry was a corporate franchise granted to the corporation against whose property the mortgage was foreclosed. . . . As a matter of fact many of the ferry privileges, as well as many of the old street railroad franchises in the City of New York, were granted not to corporations but to individuals and their associates. The court below, however, considered that under our statutes individuals cannot own or operate railroads, and that, therefore, the operation of a railroad must be deemed to be under a corporate franchise, and treated a ferry franchise as analogous. If it is possible to settle any question by a uniform current of judicial authority, the settled law is clearly the reverse of the proposition asserted. From the earliest days of railroads corporations owning them have been authorized to mortgage not only the roads but the franchise to maintain and operate them. That necessarily gave to the mortgagees the right to foreclose the mortgage after default, and to the purchasers on the foreclosure the right to operate the road. No legislation could deprive them of that right. But purchasers did not, by the mortgage sale, get the right to operate the road *under a corporate existence*. . . . A receiver appointed in a foreclosure suit would take nothing by virtue of the corporate existence of the owner of the equity of redemption, but by virtue of the mortgage."

The New York Act does not contain the equivalent of the phrases which in the Federal Act are so significant of the intent to limit its operation to activities by the corporation. In *Central Trust Co. v. Third Avenue R. Co.*, 186 Fed., 291, it was held that the State of New York was not entitled to a

preference (the only point involved in the *Gaus* case) over the Third Avenue mortgage for franchise taxes accruing under the New York statute. A petition to this Court for a writ of *certiorari* was denied. (223 U. S., 721.)

What we have said sufficiently distinguishes the other cases involving the New York franchise tax, among them *Home Insurance Company v. New York*, 134 U. S., 594, and *Central Trust Co. v. N. Y. C., etc., R. Co.*, 110 N. Y., 250.

*Spreckels Sugar Refining Co. v. McClain*, 192 U. S., 397, did not involve the question of liability of receivers for taxes.

#### FOURTH POINT.

**The petitions for writs of certiorari should be denied.**

EVARTS, CHOATE & SHERMAN,  
Solicitors for respondent, Frederick  
W. Whitridge, as Receiver.

MASTEN & NICHOLS,  
Solicitors for respondents, Joline and  
Robinson, as Receivers.

DEXTER, OSBORN & FLEMING,  
Solicitors for respondent, Ladd, as Re-  
ceiver.

HERBERT J. BICKFORD,  
ARTHUR H. MASTEN,  
MATTHEW C. FLEMING,

Of Counsel.

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# Supreme Court of the United States

OCTOBER TERM, 1912

No. 400

THE UNITED STATES

*Plaintiff*

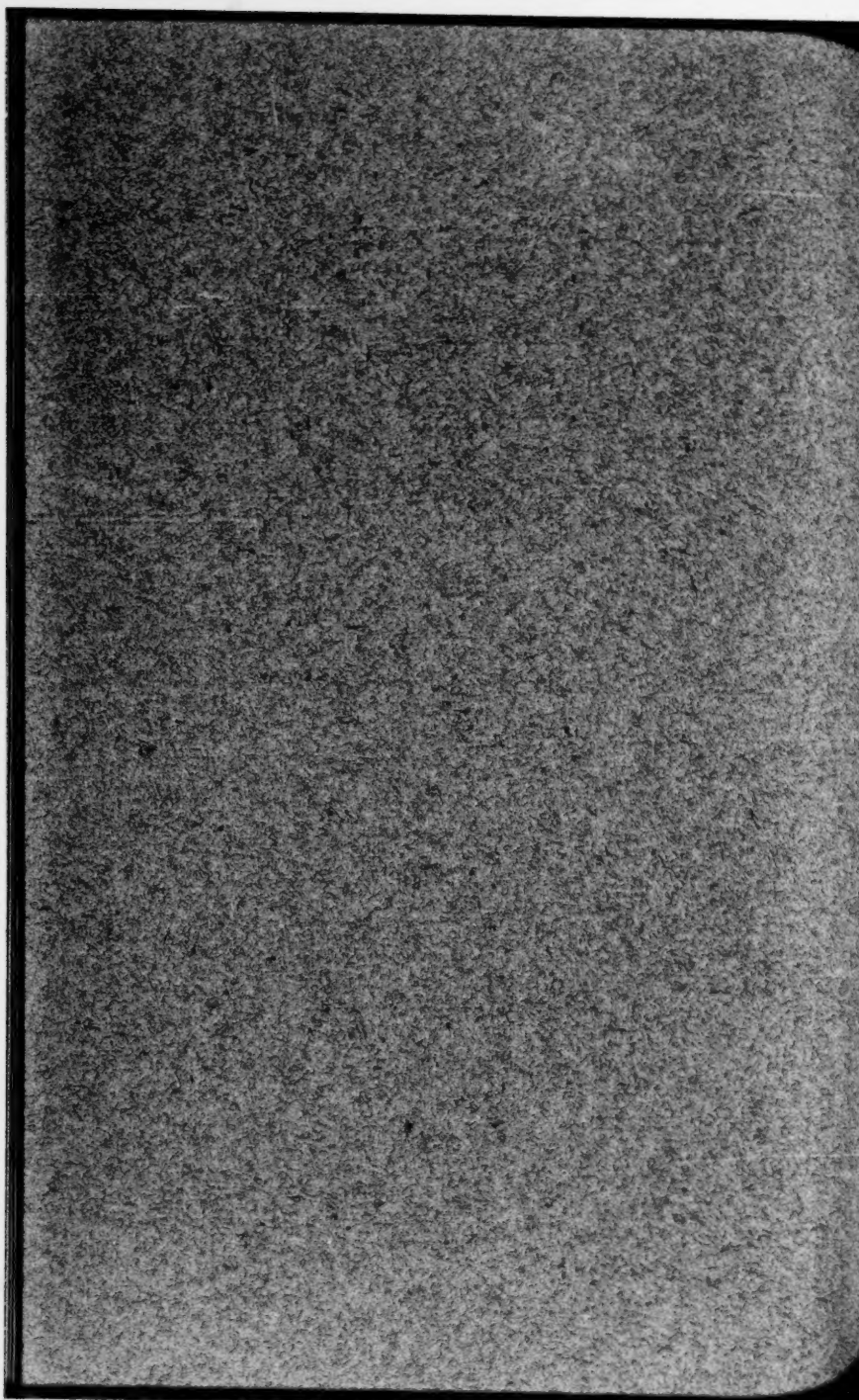
*vs.*

FREDERICK W. WHITRIDGE, as Receiver of The Texas Avenue  
RAILROAD COMPANY, and others

BRIEF ON BEHALF OF FREDERICK W. WHITRIDGE, RECEIVER,  
AND WILLIAM W. LADD, RECEIVED.

JOSEPH H. CHOATE, Jr.,  
MATTHEW C. FLEMING,

*Counsel*



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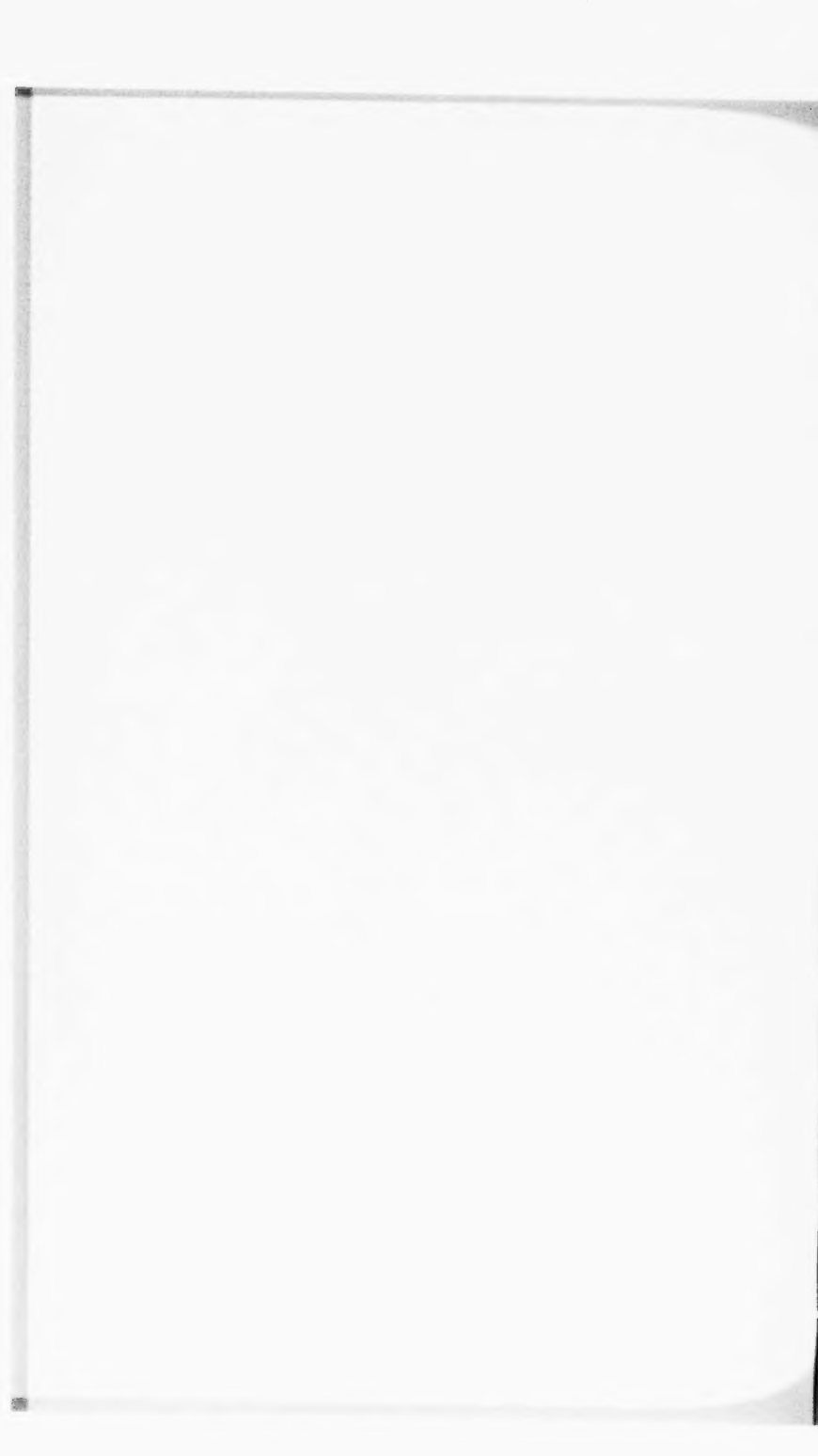
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Supreme Court of the United States.

THE UNITED STATES,  
Petitioner,

AGAINST

FREDERICK W. WHITRIDGE as  
Receiver of The Third Ave-  
nue Railroad Company, *et al.*,

October Term,  
1913. No. 466.

On Writ of Certiorari to the  
United States Circuit Court  
of Appeals for the Second  
Circuit.

**Brief on behalf of Frederick W. Whitridge as Receiver of The Third Avenue Railroad Company, Dry Dock, East Broadway & Battery Railroad Company, The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company and Union Railway Company of New York City; and William W. Ladd as Receiver of New York City Railway Company.**

This cause comes before this Court on a writ of *certiorari*, obtained by the United States of

America and addressed to the United States Circuit Court of Appeals for the Second Circuit, to review the decision of that court affirming a decree of the District Court denying the petition of the United States for orders to compel Frederick W. Whitridge as Receiver of The Third Avenue Railroad Company, Dry Dock, East Broadway & Battery Railroad Company, The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company and Union Railway Company of New York City, to make return for the years 1909 and 1910, of the net income for those years of said corporations, pursuant to Section 38 of the corporation tax law, Act of August 5, 1909, Chapter 6 (36 Stat., 112).

### **Statement.**

The respondent Whitridge was appointed receiver of the property of The Third Avenue Railroad Company (hereinafter referred to as the Third Avenue Company) covered by its First Consolidated Mortgage, dated May 15, 1900, by order of the United States Circuit Court for the Southern District of New York, dated January 6, 1908 (pp. 13-16), in a suit in equity (*Central Trust Company of New York v. The Third Avenue Railroad Company*) brought to foreclose said mortgage.

Mr. Whitridge was appointed temporary receiver of The Dry Dock, East Broadway & Battery Railroad Company (hereinafter called the Dry Dock Company) by order of the same Court made February 1, 1908, in a suit in equity (*American Hay Company v. The Dry Dock, East Broadway & Battery Railroad Company*) brought on behalf of the general creditors of the Dry Dock Company, and by decree made February 5, 1908, he was continued as receiver during the pendency of said suit.

Mr. Whitridge was appointed temporary receiver of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company (hereinafter called the 42nd Street Company) by order of the same Court made February 1, 1908, in a suit in equity (*The Barber Asphalt Paving Company v. The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company*) brought on behalf of the general creditors of the Forty-second Street Company, and by decree dated February 5, 1908, he was continued as receiver during the pendency of said suit (pp. 19-21). On June 11, 1909, he was appointed by the same Court receiver of the property of the Forty-second Street Company covered by its Second Mortgage dated July 1, 1885, in a suit in equity brought to foreclose said mortgage (pp. 34-5) (*Union Trust Company of New York v. The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company*).

Mr. Whitridge was appointed temporary receiver of the Union Railway Company of New York City (hereinafter called the Union Company) by order of the same Court made March 31, 1908, in a suit in equity (*The Lorain Steel Company v. Union Railway Company of New York City*) brought on behalf of the general creditors of the Union Company, and by decree dated April 6, 1908, he was continued as receiver during the pendency of said suit (pp. 21-23).

The nature of these general creditors' suits appears in *Re Metropolitan Railway Receivership*, 208 U. S., 90.

These orders and decrees authorized the Receiver to take possession of the railroads, franchises and other property of the companies of which he was appointed receiver, and to run, manage and operate the railroads and properties, and collect the income thereof; and directed the officers and agents



of the companies to turn over and deliver to the Receiver all property in their hands or under their control (pp. 15, 18, 20, 21, 23), and contained injunctive provisions (pp. 16, 18, 21, 23), of which the following is typical:

“And the defendant, Dry Dock, East Broadway and Battery Railroad Company, and its officers, directors, agents, and employees, and all other persons claiming to act by, through, or under the defendant, and all other persons whomsoever, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the Receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties or his operating the same” (p. 18).

The decree in each of the general creditors' suits adjudged that the defendant “is insolvent and that its assets and property of every description constitute a fund in which the complainant and other creditors of the said defendant corporation are interested, and that the assets of said corporation should be marshaled and the extent of the rights, liens, equities, and priorities of the several creditors should be ascertained and decreed by the Court” (pp. 17, 19, 21).

During the years 1909 and 1910 Mr. Whitridge was in possession of and operated the properties of all the companies under and pursuant to the above mentioned decrees (fols. 20, 64).

On May 17, 1909, a foreclosure decree was made in the cause brought to foreclose the mortgage of the Third Avenue Company, adjudging, among other things, that there was due and owing on the bonds secured by the mortgage the sum of \$40,381, 173.33, being \$37,560,000 for principal and \$2,821, 173.33 for interest, and directing a sale of the property subject to the mortgage (p. 38 *et seq.*). Pursuant to this decree the property was sold on

March 1, 1910, at public auction to James N. Wallace, Adrian Iselin and Harry Bronner, a purchasing committee of the holders of said bonds, for \$26,000,000, subject to certain existing prior liens and charges. The sale was confirmed by decree dated April 13, 1910 (p. 55), which directed the Special Master, Trustee under the mortgage and Receiver to convey the property to the purchasers by deed, the form of which was approved by the decree (p. 61), and also directed the Receiver to retain possession of and operate the property until the purchasers had paid the balance of the purchase price. The decree adjudged that the purchasers were entitled to all income accruing subsequent to the date of sale not applied by him to the payment of his debts. The deed was delivered to the purchasers on April 18, 1910, and conveyed all the property of every nature and description owned by the Third Avenue Company, and all property in the possession of the Receiver, at the time of the sale (p. 65). As appears in *People ex rel. Third Avenue Railway Company v. Public Service Commission*, 203 N. Y., 299, these purchasers organized a new corporation to acquire the property.

On November 30, 1909, a decree was entered in the cause brought to foreclose the mortgage of the 42nd Street Company, adjudging that the amount due on the bonds secured by the mortgage was \$1,670,933, of which \$1,600,000 was principal and \$70,933 interest, and directing that the property subject to the mortgage be sold (p. 35).

Acting under the views expressed by the Circuit Court (LACOMBE, J.) in *Pennsylvania Steel Company v. New York City Railway Company*, 176 Fed. Rep., 477, the Receiver made no returns for the years 1909 and 1910; but each corporation made return for the year 1909, in which it stated that all its property was in the possession of Mr. Whitridge as Receiver, and that it had received no income dur-

ing that year (pp. 23-32). It does not appear that the Commissioner of Internal Revenue returned any of these returns, or took any steps provided by the statute to obtain from these corporations any further return or information, or to subject them to the statutory penalties. The respondent Whitridge alleged in his answer and the allegation is not denied, that—

“during the years 1909 and 1910 none of the said corporations of which he is receiver as aforesaid carried on or did any business in respect of the property in his possession as such receiver, respectively, and received none of the income thereof, but that all of such property was in his exclusive possession as receiver as aforesaid, and that he as such receiver managed, controlled, and operated the same and carried on and did all the business in respect thereof and received all the income arising therefrom” (fol. 64).

The respondent Ladd was appointed Receiver of New York City Railway Company in a general creditors' suit (*Pennsylvania Steel Company v. New York City Railway Company*), by order dated July 23, 1908, in the place and stead of Adrian H. Joline and Douglas Robinson who had been appointed Receivers of that corporation by order dated September 24, 1907 (Metropolitan Record, p. 89). The Government has not specifically asked for an order directing a return by the Receiver of the New York City Railway Company.

The Circuit Court (LACOMBE, J.) denied the application of the United States for an order to compel these receivers to make return for the years 1909 and 1910 (p. 71). His opinion is printed at page 66 *et seq.* of the record. The United States appealed to the Circuit Court of Appeals, which court affirmed the decree of the Circuit Court (198 Fed. Rep., 774). The opinion is printed at page 78 *et seq.* of the Record. The case comes before this court on

a writ of *certiorari* addressed to the Circuit Court of Appeals, granted on the petition of the United States.

### FIRST POINT.

**The act in question imposes a tax upon corporations for the doing of business by them in their corporate capacities, based upon the net income received by them. If they do no business, they are not subject to the tax. The act does not expressly apply to receivers of corporations.**

#### (a) *Provisions of the Act.*

Section 38 of the Act (36 Stat. L., 112) provides (p. 112) "That *every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year*"; that such net income shall be ascertained by deducting from the gross income "of such corporation" expenses of maintenance and operation, losses, interest actually paid on "*its bonded or other indebtedness,*" all sums "*paid by it for*" taxes, and amounts "*received by it*" as dividends upon stock of corporations subject to the tax (p. 113);

"The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corporate or *quasi* corporate organization; or, when applied to insurance companies, for doing the business of such companies. As was said in the *Thomas Case*, 192 U. S., 363, *supra*, the requirement to pay such taxes involves the *exercise of privileges*, and the element of absolute and unavoidable demand is lacking. *If business is not done in the manner described in the statute, no tax is payable*" (pp. 151-2).

That the tax is not payable unless the *corporation actually carries on business*, even though it may receive income from property owned by it, is expressly decided in *Zonne v. Minneapolis Syndicate*, 220 U. S., 187, where the defendant, a real estate corporation, had leased its lands for 130 years, and had amended its charter so as to limit its purposes to holding title to the property, and, for the convenience of its stockholders, receiving and distributing the rents. The Court said (p. 191):

"It had wholly parted with *control and management* of the property; its sole authority was to hold the title subject to the lease for 130 years, to *receive* and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. The corporation had practically gone out of business in connection with the property and had *disqualified itself* by the terms of the reorganization from any *activity* in respect to it. We are of opinion that *the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909.*"

In *McCoach v. Minchill Railway Company*, 228 U. S., 295, a railroad corporation had leased its railroads and all property connected therewith and all its rights, powers and franchises (other than the franchise of being a corporation), and thereafter had maintained its corporate existence, received annually the rentals accruing under the lease, interest on its bank accounts, and interest and dividends on investments constituting a "contingent fund," such rentals and income amounting to about \$275,000 a year, and had paid the expenses of maintaining an office and stock transfer books, including salaries of its officers and clerks, and other expenses of keeping up its corporate existence, and had distributed the residue of its receipts among its stockholders as dividends. The Court held that it was not "doing business" within the meaning of the Act. After examining at length the provisions of the Act and the earlier decisions of the Court construing it, the Court said (pp. 303-4) :

"From the facts as stated above it is entirely clear that the Minchill Company *was not*, during the years 1909 and 1910, *engaged at all in the business of maintaining or operating* a railroad, which was the prime object of its incorporation. This business, by the lease of 1896, it had turned over to the Reading Company. If that lease had been made without authorization of law, it may be that for some purposes, and possibly for the present purpose, the lessee might be deemed in law the agent of the lessor; or at least the lessor held estopped to deny such agency. But the lease was made by express authority of the State that created the Minchill Company, conferred upon it its franchise, and imposed upon it its correlative public duties. The effect of this legislation and of the lease made thereunder was to constitute the Reading Company the public agent for the operation of the rail-

road and to prevent the Minehill Company from carrying on business in respect of the maintenance and operation of the railroad so long as the lease shall continue. And it is the Reading Company, and not the Minehill Company, that is 'doing business' as a railroad company upon the lines covered by the lease and is taxable because of it."

It is clear, therefore, that a corporation, which does no business, is not taxable under the Act, although it may own property which is being used in business by another.

The Court below did not err in its construction of the Act, as the following extracts show:

"There can be no doubt that the special excise tax provided for by the act is imposed as a tax upon doing business in a corporate capacity" (Record, fol. 148).

"If the business be carried on by an individual or a partnership, no tax is imposed" (Record, fol. 148).

"The act, in all its provisions, clearly contemplates that the tax is to be paid by a corporation which is actually engaged in business as an actively operating concern" (fol. 149).

(c) *The Act does not mention receivers, and they are not embraced within its terms.*

There is nothing in the Act which indicates that Congress intended to impose a tax upon receivers of corporations. To construe it so as to apply to receivers would enlarge its operation so as to embrace matters not specifically pointed out, and which are not closely analogous to the objects expressly intended to be taxed.

It is elementary that a tax law applies only to such objects as are clearly embraced within its terms. It cannot be enlarged by construction to

embrace persons or property not clearly intended to be taxed.

The courts below held that the Act was not applicable to these receivers. Thus the Circuit Court (Lacombe, *J.*), in *Pennsylvania Steel Company v. New York City Railway Company*, 176 Fed. Rep., 477; in instructing the Receivers as to making returns under this Act, said:

"The act contains no provisions as to receivers, and it is not thought that Congress intended to include bankrupt corporations with no net income whose properties are being administered by a court."

See also his opinion in this proceeding (fol. 124).

The Circuit Court of Appeals (COXE, *J.*), said:

"The taxation of business done and income received by receivers is not contemplated by the act; receivers are not mentioned. This omission cannot be attributed to inadvertance. . . . Whatever the reason may have been, the fact remains that the doing of business by receivers in their representative capacity as officers of the court is not taxed by the act, and no provision is made therein for the ascertainment and collection of such a tax" (Record, fol. 147).

\* \* \* \* \*

"It cannot be held that an act which nowhere mentions receivers and which in every paragraph deals with corporations and joint-stock companies actually engaged in business can, by construction, be made to cover the business temporarily undertaken, of conserving the property of such a corporation for the benefit of its creditors and the public" (fol. 149).

No other conclusions would be justified. The Act declares who "shall be subject to pay" the tax, namely: "every corporation, joint stock company



*or association . . . and every insurance company*"; and the tax is payable "with respect to the carrying on or doing business *by* such corporation, joint stock company or association, or insurance company", measured by the income received "by it". These provisions do not embrace a receiver of any such corporation, etc., or the business done or income received by him.

The Act contains elaborate provisions for ascertaining the net income of the corporation, and requires that return shall be made by and under the oaths of certain specified *officers of the corporation*. There is no provision for a return by a receiver, and the requirements of the Act would not be met by a return by a receiver. It requires that the return shall state the income received, and the specified payments made thereout, by the corporation. The receiver could not include within these headings his receipts and disbursements, nor could the officers of the corporation include in their return the receipts and disbursements of the receiver. The Government contends that it makes no difference who makes the return. We submit that it makes all the difference in the world. The Act contemplates that the return shall be made by responsible officers of the corporation, presumably having knowledge of the facts, in order that a full and true return may be obtained, and the corporation held responsible for its contents, and penalties be imposed for false returns. Obviously, a receiver could not be subjected to the penalties imposed by the statute.

The return is to include many matters which are of no concern of a receiver, and in respect of which his information, even if he had power to obtain it, would necessarily be derived from others over whom he had no control, such as the outstanding capital stock, bonds and other indebtedness, the gross income, expenses, depreciation and the losses

of, and interest paid by, the corporation itself. Included in each one of these items there might be purely corporate transactions, having no relation whatsoever to the property in the hands of the receiver, and concerning which he would have no duty or responsibility; for the corporation might be carrying on business in respect of property not entrusted to the receiver. Thus, suppose that the Third Avenue Company had had securities not covered by its mortgage which was foreclosed, and had retained and dealt with them, as the Minehill Company retained and dealt with its "contingent fund". The Receiver could not include these in his return.

Receivers cannot be brought by construction within any of the provisions of this Act.

*United States v. Harris*, 177 U. S., 305, was an action brought against receivers of a railroad corporation to recover a penalty for a violation of the statute in relation to the transportation of livestock. The Government contended that the act was intended to apply to all common carriers and to all persons carrying on the business of common carrier. The Court said that to hold the receivers they must be regarded as embraced in the word "company," used in the act; and that that would be a strained and artificial construction; and it held that receivers were not within the terms of the act.

There is even less ground, in the provisions of the acts and their purposes, for the contention that receivers are within the scope of the act now under consideration, than there was for contending that they were within the act involved in the *Harris* case. There is no apparent reason why an act in relation to the transportation of livestock should not apply to receivers as well as to corporations; but, as pointed out in the opinions below, Congress probably intended that the Act of 1909 should not apply to bankrupt estates in the hands of the Court

for administration and distribution, both because of the nature and situation of such estates, and because it was necessary so to frame the statute that the tax could not be held to be a tax upon property within the decision in the *Income Tax Cases* (157 U. S., 429; 158 U. S., 601). The Act of 1909, like the statute involved in the *Harris* case, provides for heavy penalties; and the same rule of construction is applicable to both statutes.

We respectfully submit, therefore, that receivers of corporations are not within the terms of the Act.

## SECOND POINT.

**It is not the intent of the Act to impose a tax upon the doing of business by a receiver. If this were its intent, it would be unconstitutional so far as it relates to business done by receivers appointed by State Courts or under State laws, and therefore, it cannot be inferred that Congress intended to tax the business done by receivers.**

If this Act applies to receivers it is either because it taxes the doing of business by a receiver, or because business done by a receiver is deemed to be business done by the corporation of which he is receiver. Of course, it cannot be sustained as a *direct* tax upon the property and income received by a receiver.

*(a) The Act if applicable to receivers would apply to receivers appointed by State courts or under State laws.*

The Act can apply only to receivers of corporations, joint stock companies or associations or in-

insurance companies. This fact shows conclusively that Congress did not intend to tax *generally* the privilege of doing business through the medium of a receivership; but, at most, only a limited class of receiverships. It would, however, apply to receivers of such corporations and other organizations appointed by State courts and under State laws, as well as to receivers appointed by Federal courts and under Federal laws.

(b) *The Act would be unconstitutional so far as it attempted to tax the privilege of doing business by State receivers.*

While it may be that Congress would have had power under the Constitution to impose such an excise upon the privilege of doing business by Federal receivers, it is at least doubtful whether it would have had that power with respect to the business done by receivers appointed by State courts or under State laws.

The governmental agencies of a State cannot be taxed by the Federal Government, nor the governmental agencies of the Federal Government by a State. This applies to judicial agencies. The principle was thus stated in *Flint v. Stone Tracy Company*, *supra* (pp. 157-8) :

"The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the State. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws and similar governmental functions cannot be taxed by the Federal Government. *The Collector v. Day*, 11 Wall., 113; *United States v. Railroad Co.*, 17 Wall., 322; *Ambrosini v. United States*, 187 U. S., 1."

In *Collector v. Day, supra*, it was held that an excise could not be imposed upon the salary of a judge of a State probate court.

There is, it is true, a distinction between purely governmental activities and activities by a State which are of a private nature. This distinction was thus stated in *South Carolina v. United States*, 199 U. S., 437, which contains a critical examination of the leading authorities on this subject (p. 461):

"These decisions, while not controlling the questions before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

And in that case it was held that persons acting as agents of the State of South Carolina in selling liquor under its dispensary law were subject to the payment of the license taxes imposed by the Federal internal revenue law. Much stress was laid upon the fact that the dispensary system had been adopted largely for profit, and that the hope of profit might induce the States to take possession of all subjects of internal revenue, indeed of all property and business, and thus deprive the Federal Government of means of support, if such activities of the States be exempt from Federal taxation; and it was declared that the Constitution must be interpreted in the light of the common law and the conditions surrounding it at the time of its adoption, and that such an extension of the activities of the States were not then contemplated, and that, therefore, Congress had power to tax this business, which was of a private nature.

The business carried on by the receivers in the case at bar, was, however, of a widely different

nature. It was the performance of one of the functions of the court which was most strictly governmental in character. The power to take possession of property through the medium of a receiver, was a well recognized function inherent in courts of equity long before the Constitution was adopted. Under the more complex conditions of modern times, and especially the increase in the number and size of corporations and railroads and other public utilities, this power has been considerably extended and more frequently resorted to. In some jurisdictions it is still derived from its original source, while in others it is largely dependent upon statutes. But whatever its source, it is an important function and indispensable instrumentality of courts in the administration of the laws. In some instances executive departments of the Federal or State governments have power to take possession of assets through receivers, *e. g.*, Controller of the Currency, of national banks, and State banking or insurance superintendents of State banks and insurance companies. When the State reaches out its strong arm and takes possession of property through such receivers or through its courts and administers and distributes it to those found to be entitled to it according to its laws, can it be said to be acting in a purely private capacity? The nature and purpose of such possession are antagonistic to this idea. When a court of equity takes possession of property through a receiver, the property is deemed to be *in custodia legis*. The receiver is merely the ministerial officer or arm of the court, subject in all things to its direction and control. No court of another jurisdiction can interfere with such possession. Thus in *Porter v. Sabin*, 149 U. S., 473, the Court said:

“When a court exercising jurisdiction in equity appoints a receiver of all the property

of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it (p. 479).

\* \* \* \* \*

"Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other" (p. 480).

*In re Tyler*, 149 U. S., 164.

While the court may exercise this jurisdiction in suits between individuals, and for the purpose of adjudicating purely private matters; and, as an incident of such possession, preservation and administration, may, and often does (particularly in case of railroads and other public utilities) actively operate the property and receive income; nevertheless, its function is purely governmental, and all property received by the receiver is received in the exercise of the power thus conferred upon him, and is held in equitable execution. The process of the court is always available to assist him and to prevent interference in the discharge of his duties. The essence and purpose of the court's action, namely, determination of the rights of claimants and preservation of the fund to meet the just claims against it, is judicial; the carrying on of the business is purely incidental to the preservation of the property. Neither the court nor the State by so doing engages in private business, in the sense of that term as employed in *South Carolina v. United States*. If a probate court exercises a governmental function when it administers the estate of a decedent and

adjudicates the rights of persons interested therein, it is difficult to see why a court in administering and determining the rights in respect of the property in the hands of a receiver is not equally exercising a strictly governmental function. Clearly the judicial determination of private rights is a governmental function, indispensable to the security of government and to public welfare. The power of the State may be invoked to enforce the process and decrees of its courts in suits involving purely private interests, since the determination and enforcement of such rights is a matter of the highest governmental concern. The means by which courts determine such rights and administer the law are as much instrumentalities in the administration of justice as the judge himself. The court exercises a governmental function irrespective of the nature of the litigation. If the Federal government has power to tax the privilege of doing business through the medium of a receivership, it may also tax the activities of every other instrumentality of State courts. The converse of this was thus stated by Marshall, *Ch. J.*, in *M'Culloch v. Maryland*, 4 Wheat., 316:

"If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; . . . they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government."

It has been the public policy to reduce rather than increase the cost of judicial proceedings. A tax upon judicial instrumentalities should be exacted only when the intent to tax clearly appears.

We respectfully submit, therefore, that, in view of the foregoing considerations, Congress did not



intend to apply this tax to the doing of business by a receiver, whether appointed by Federal courts or State courts. Of course, Congress had power to impose a *direct* tax upon property or income received by receivers, but this Act would not be effective for that purpose.

### THIRD POINT.

**These Receivers did the business of operating these railroads and received all the income thereof. The corporations did no business and received no income. Business done by the Receivers cannot be regarded as business done by the corporations. The Courts below did not err in holding that the Receivers could not be compelled to make the return or to pay any tax.**

*(a) As matter of fact, none of these corporations did any business or received any income during the years 1909 and 1910.*

Each corporation of which Mr. Whitridge was Receiver made return for the year 1909, in which it stated that it did not have possession of any of its property and had received no income (pp. 23-32). The Receiver alleged in his answer, and the allegation is not denied, that during the years 1909 and 1910, he had exclusive possession of the property of these corporations and did and carried on all the business in respect thereof, and received all the income therefrom, and that the corporations did no business, and received no income in respect of such property (fol. 64).

The orders appointing the Receiver in each case appointed him receiver of the property specified in the order, *and of the income thereof*, and authorized him "*to run, manage and operate*" the property and collect the income thereof, and directed the corporation, its "officers, directors, agents, and employees and all other persons whomsoever, \* \* \* to turn over and deliver to said Receiver," the property of the corporation, and enjoined them from "interfering in any way whatever, with the possession or management of any part of the property over which the Receiver is hereby appointed" (fols. 29-31). The property and the income were *in custodia legis*. The orders appointing the Receiver changed the possession as well as the subsequent control and management of the property and tied the hands of the corporations in respect thereto (High on Receivers, § 15). It is not claimed that these corporations have violated the injunctions. As a matter of fact, they have done no business and have received no income; and we submit that, as matter of law, they have done no business and have received no income; and that neither the corporations nor the Receiver has exercised any franchise the exercise of which is taxable under the Act.

We submit that these corporations were more completely divested of their property and the operation and maintenance thereof and the carrying on of their business, than were the corporations involved in the *Zonne* and *Minchill* cases, *supra*; and their actual activities were much more restricted, because they retained possession and control of no property, and received no income, whatever.

The tax is payable only in the event that the corporations did business, and also received net income in excess of \$5,000. If they did no business; or, if they did business, but received no income; or,

if they did no business, but received income; they are not, in any such case, liable for the tax.

We understand that the appellant does not contend that the corporations themselves did any business or received any income, but that the Receivers' operations and income are within the statute, upon the theory that the Receiver exercised the franchises of these corporations.

We submit, however, that the Act applies only to an actual, not a theoretical, exercise of corporate franchises; and to income actually received by the corporation as the result of its corporate activity. And this is the effect of the decisions in the *Zonne* and *Minchill* cases. The very object of appointing these receivers was to take away from the corporations the possession and operation of their property and the receipt of the income therefrom. That a receiver does not take the place of the officers of the corporation, and is not its agent, we shall attempt to show later.

*(b) Corporate franchises, the exercise of which is taxable.*

A corporation carrying on a business is subject to the tax, while an individual or co-partnership carrying on the same character of business is not subject to the tax. Individuals owning and operating a street railroad would not be taxable, although their operation of the railroad would involve the exercise of franchises, that is, the right to use public streets for railroad purposes. Such franchises (which we shall refer to as secondary franchises), may be granted to an individual, and an "individual as well as a corporation may operate a railroad" (*People v. Erie Railroad Company*, 198 N. Y., 369-375). Most of the secondary franchises of these companies were originally granted to individuals. (*c. g.*, Chap. 512, Laws of 1860. Chap. 825, Laws of 1873. Chap. 361, Laws of 1863.) Such

franchises cannot now be granted to individuals in the City of New York (Railroad Law, § 93); but railroad corporations may mortgage their franchises, and they may be sold to and exercised by individuals. (*People ex rel. Third Avenue Railway Company v. Public Service Commission*, 203 N. Y., 299, 308, which involved the sale of the property and franchises of the Third Avenue Company.) The State might destroy the corporate franchise, but it has no power to destroy the secondary franchises (*People v. O'Brien*, 111 N. Y., 1).

The corporate franchise, that is, the right to do business in a corporate capacity, is wholly distinct from secondary franchises. The corporate franchise is personal in character and inalienable, and exists only during the life of the corporation. On the other hand, secondary franchises are alienable, and may exist wholly apart from a corporate franchise, and may continue after the corporation and corporate franchise have been destroyed. Railroads are operated by virtue of secondary franchises.

If, therefore, the Act imposes a tax, not upon a railroad business, but upon the doing of such business in a corporate capacity, it is clear that the only franchise the exercise of which is taxable is the corporate franchise. The right to do business in a corporate capacity has many advantages, and is a valuable right. It is only the exercise of this right that Congress intended to tax.

These distinctions were clearly recognized in *McCoach v. Minchill Railway Company*. The Minehill Company had leased all its railroads and franchises (except its franchise to be a corporation) to the Reading Company. The Court held that the Reading Company was doing the business and was taxable because of it; but that the Minehill Company, even though it retained its corporate franchise, and did such acts as were necessary to maintain its corporate existence and receive the ordi-

nary fruits that arose from the ownership of its property, was not doing business within the meaning of the Act. It would necessarily follow if the lessee of its railroads had been an individual and the business had been carried on in any other than a corporate capacity, no tax would have been payable.

*(c) The Receivers never possessed or exercised the corporate franchises of these corporations.*

The corporate franchises are inalienable. The corporations could not mortgage them. Creditors could not reach them. The court could only take such property and rights as the creditors were entitled to have applied to the payment of their debts. It could not vest corporate franchises in its receivers. The receivers could not exercise them. How could they act in a corporate capacity? They acted as individuals, not as corporations or through corporate forms or agencies. They were the arm of the court, acting under the orders appointing them, and not servants of the corporations. The corporations still existed; but they could not interfere with the receivers' possession and the performance of their duties, and could not exercise their corporate powers in respect of their property. In the cases at bar the appointment of receivers left these corporations mere shells, stripped of all their properties; but they, and they alone, possessed their corporate franchises. When the property of the Third Avenue Company was sold and conveyed under the decree that corporation still existed and possessed its corporate franchise; but all of its secondary franchises with the right to operate them passed to the purchasers. The Receiver had possessed and operated all that thus passed by the sale, and no more. The new corporation did not succeed to the corporate franchise of the old Third

Avenue Company (*People ex rel. Schurz v. Cook*, 110 N. Y., 443; S. C., 148 U. S., 397).

The cases at bar are far different from the case of a statutory receiver, where the corporation has been dissolved and all its property and powers vested in a statutory receiver. Chancery receivers do not represent the corporation in its individual or personal character, nor supersede it in the exercise of its corporate powers, except so far as the property intrusted to their care is concerned. Notwithstanding their appointment the corporations were clothed with their franchises and still existed. They could still exercise their powers if thereby they did not interfere with the management of the railroads. They could do many corporate acts and could do all things necessary to preserve their legal existence, could sue and be sued, and were liable for their acts and upon their contracts and covenants the same as if the receivers had not been appointed.

*Decker v. Gardner*, 124 N. Y., 334.

The Court could, in a foreclosure or general creditors' suit take possession of the secondary franchises and the receivers could exercise them.

*Memphis & Little Rock Railroad Company v. Commissioners*, 112 U. S., 609, 619.

The possession of the railroads by the receivers gave them the power to operate them and exercise the secondary franchises which were inseparable from them. To do this they did not require and did not exercise any corporate franchises. They merely did, in their capacity as receivers, what individuals might do.

*People ex rel. Third Avenue Railway Company v. Public Service Commissioners*, 203 N. Y., 299, 308.

The Government contends that corporate franchises and secondary franchises are inseparable. In other words, that no franchises merely to be corporations were ever granted to these corporations, but franchises to be corporations to maintain and operate railroads in certain streets. It is stated at page 3 of the Government's brief that "They had received charters under the statutes of the State of New York which authorized a certain number of persons to 'become a corporation, for the purpose of building, maintaining and operating a railroad', and required a certificate of 'the names and descriptions of the streets, avenues, and highways upon which the road is to be constructed' ". The charters of these corporations are not before this Court. It is pure assumption on the part of the Government that they are of the character thus described. The Union Company's charter was granted by special statutes (Chap. 361, Laws of 1863; Chap. 340, Laws of 1892). The provision of the present Railroad Law (§ 2) that the certificate shall contain "the names and descriptions of the streets", etc., was first inserted in the statute in 1884 (Chap. 252, Laws of 1884). All the other corporations of which Mr. Whitridge is receiver were organized before that time. The Third Avenue Company was organized in 1853 and its secondary franchises were granted by The City of New York to Van Schaick and others in 1852 (*People ex rel. Third Avenue Railroad Company v. Newton*, 112 N. Y., 396). The franchises of the Dry Dock Company were granted by Chap. 512, Laws 1860, and other statutes, and those of the Forty-second Street Company by Chap. 825, Laws 1873, and other statutes. In most instances these grants were to individuals, who assigned them to the corporations when organized. But even if the statute had required such matter to be included in the charter, whether a certificate of incorporation or a statute, the corpora-

tion would not thus or thereby acquire its secondary franchise. Under the Constitution of the State of New York the municipal authorities have the exclusive right to grant the privilege of maintaining and operating railroads in the streets; that is, the secondary franchises (Constitution, Art. III, § 18. *People v. O'Brien*, 111 N. Y., 1).

The Government's contention that neither the Court nor the Receivers could carry on the business, and that it could be carried on lawfully only by the corporations, is based upon the same fallacy of the unity of the two franchises. This is in direct conflict with the decision in *People ex rel. Third Avenue Railroad Company v. Public Service Commission*, and *McCouch v. Minchill Railroad Company*, *supra*, both of which recognize a possible separate ownership and exercise of these two classes of franchises.

In respect to making the returns required by the Act of 1909, the corporations did all that was within their power to do. The returns were as complete as they were capable of making them. If they were incomplete or false, the statute gives ample remedies. The statute does not require receivers to make returns.

(d) *The Receiver did not take the place of the corporation or its officers, and was not its agent.*

It is alleged in the petition (fol. 21) that the Receiver by virtue of this appointment "took the place of the directors and officers of the said companies during the pendency of the above-entitled actions to the same effect and with the same liabilities, obligations, and duties as were and are imposed by law upon such directors and officers of each of said companies, and more particularly by the provisions of the said section."

It is elementary that a receiver does not take the place of and is not subject to the same liabili-



ties, obligations and duties as the directors and officers of a corporation. He is merely the officer or arm of the Court, and has only such powers and duties as are granted and imposed by the order of the Court. He is not the agent or representative of any party to the action, but is an officer of the court exercising his functions for the common benefit of whoever may ultimately be adjudged to be entitled to the property. (*White v. Ewing*, 159 U. S., 36.) The corporation is not responsible for his acts, a most important element of agency. There may be, and usually are, debts and obligations of the corporation which are not obligations of the receiver or payable out of the property in his hands. The corporation is still capable of doing business and incurring obligations, except in respect of the receivership property (*Decker v. Gardner, supra*). A receiver's powers and duties are very different from those of directors and officers. He may be temporarily entrusted with the management and operation of the property, but that is only an incident of his main function, namely, to preserve the property pending the sale or disposition of it by the court, and to receive the income for the benefit of the creditors. The corporation may or may not be found to be entitled to share in the distribution. Of course, the income cannot be taxed under the Act of 1909 by *reason of ownership*. The duties of the officers and directors are prescribed by law and the by-laws of the corporation, and they are the instrumentalities through which *the corporation acts*. They may mortgage or sell the property, buy other property, declare dividends and do many other things which a receiver may not do.

As Lacombe, *J.*, said, after remarking that "this tax is not imposed upon the property *nor upon*

*the franchises under which the railroad is operated in the different streets and avenues" (fol. 124) :*

"Receivers are sometimes referred to as the representatives of the corporations, but that expression is not exactly accurate. In receiverships of this sort the corporate life still continues, the corporation may go on electing officers and preserving its organization. Its property (including the franchises under which its road is operated) has been seized by the Court, and is held for the benefit of creditors or persons entitled to it; sometimes the property thus seized is sold by order of the Court *but such sale does not include the franchise of the debtor to be a corporation and to do business in a corporate capacity with the privileges thereby secured to it*, as pointed out in *Flint v. Stone Tracy Co.*, *supra*, p. 161."

(c) *Income received by a receiver is not to be deemed to have been received by the corporation.*

The income collected by the Receiver belongs not to the corporation, but to whomever may ultimately be adjudged to be entitled to it. Receivers are appointed in order that the Court may take the income and apply it. There is seldom any income to be turned over to the corporation. In the case of the Third Avenue Company the property sold for many millions less than the mortgage debt, and the company will not receive back a dollar of property or income. The record does not disclose whether this will be the case of each of the other corporations. But the tax is imposed, not upon what a corporation may hereafter receive or be entitled to receive, but upon the income "*received by it*" "*within the year*" for which the tax is levied. None of these corporations received or became entitled to any income for the years 1909 and 1910.

The corporations ceased to have control and man-

agement of their property and business, and have been disqualified by injunction from doing any business in respect of the property in the possession of the Receiver and from receiving the income which the government seeks to tax. It is clear that the income received by the Receiver was not received by the corporations and did not arise from business done by them. The "tax is imposed, not upon the franchise of the corporation," nor upon its property or income; but "upon the doing of business in a corporate capacity," and the income received is merely the measure of the tax. It is not a tax upon income. The Act would be unconstitutional if it were (*Flint case, supra*). There must be "activity" by the corporation, and if it receives income without actively doing business it is not liable for the tax (*Zonne and Minchill cases, supra*).

(f) *Imposition of the tax on receivers might result in a heavier tax on bankrupt estates than on going concerns for the same volume of business.*

The application of this statute to receiverships might in most instances require larger tax payments out of the property than if the same property were in the possession of the corporation. For the purpose of ascertaining the net income which is the measure of the tax, deductions are to be made from the gross income, among other things, for expenses "*actually paid within the year out of earnings*," for maintenance and operation, and "*interest actually paid within the year on its bonded or other indebtedness*." During a receivership interest is seldom paid except upon the prior liens and the receiver's obligations, although the funds in hand may be sufficient to pay interest on at least some of the other indebtedness. On the other hand, corporations would almost invariably pay their interest to the full extent of their net income, and, unless hopelessly insolvent, would bor-

row money to pay the rest. Again, receivers are often compelled to borrow money. Would they be entitled to deduct interest on these debts, as being interest paid on "its [the corporation's] indebtedness"? The debts of the receiver are not debts of the corporation, but are obligations incurred by the court for the payment of which it imposes a charge upon the property in its possession. Again, the large expenses of a receivership for fees of receivers, counsel, masters, etc. (unlike salaries of officers and fees of counsel of a going corporation, which are paid out of income as they arise), are not usually paid until the termination of the receivership, and then usually out of the funds in the possession of the court, whether arising from income or the sale of the property. Thus, deductions being allowed only for payments actually made or actually made out of income, during the year, a going concern might, and usually would, be entitled to larger deductions than a receiver, although the gross income in each case might be the same. Congress never intended any such anomaly.

#### **FOURTH POINT.**

##### **Appellant's cases distinguished.**

The courts below distinguished the cases cited by the Government, as follows (fols. 124, 150) :

"When it is conceded, as it must be under *Flint v. Stone Tracy Co.*, 220 U. S., 107, that this tax is not imposed upon the property nor upon the franchises under which the railroad is operated in the different streets and avenues, most of the cases cited by the Government became inapplicable."

Furthermore, some of these cases involved taxes upon franchises, irrespective of their exercise or use in business. None of them was a tax upon the doing of business in a corporate capacity as distinguished from the franchise or right. The business done or capital employed was merely the measure of the tax. In the Government's brief in this Court, which was not received until October the 6th, after our brief had been written, the only cases involving the liability of receivers for state franchise taxes which are cited are *Philadelphia & Reading Railroad Company v. Commonwealth*, 104 Pa. St., 80, 85; *Central Trust Company v. New York City and Northern Railroad Company*, 110 N. Y., 250; *People ex rel. Joline, et al., as Receivers of The Metropolitan Street Railway Company v. Williams*, 200 N. Y., 528; and *New York Terminal Company v. Gaus*, 204 N. Y., 512.

The act involved in *Philadelphia & Reading Railroad Company v. Commonwealth*, 104 Pa. St., 80, provided that every railroad corporation "owning, operating or leasing . . . any railroad . . . shall pay . . . a tax . . . upon the gross receipts of said company for tolls or transportation." The court treated it as a direct tax on the gross receipts, and held that the fact that the corporation was in the hands of receivers did not relieve the corporation from liability for the tax. The receivers were not parties to the action, and the question of their obligation to make the return required by the statute or pay the tax was not involved. In *Philadelphia Steamship Company v. Pennsylvania*, 122 U. S., 326, this Court held that a "similar act" (p. 327) imposed a tax "directly upon the receipts" (p. 335) and not upon the franchise (p. 342); and was a regulation of interstate commerce, and therefore unconstitutional (p. 347). Clearly, the tax involved in the *Reading* case was not a tax upon the

doing of business in a certain capacity, measured by the income received by the corporation. The act imposed a direct tax on the gross receipts. Therefore this was really a property tax, for which the corporation owning the property, and the receiver who had possession of it, and indeed the property itself, however it might be situated, might be liable.

The statutes of the State of New York imposing taxes on corporations have been frequently amended, and the decisions have been conflicting, and some of them expressly overruled (*People ex rel. United States Aluminum Printing Plate Company v. Knight*, 174 N. Y., 475, 485). Some of the statutes prior to 1906 had provided that every domestic corporation should pay a tax "upon its franchise or business", "to be computed" upon dividends declared, or if none were declared, upon the "appraised capital" of the corporation; and that every foreign corporation should "pay a like tax for the privilege of exercising its corporate franchise . . . in this state." These taxes have uniformly been to all intents and purposes direct taxes levied upon the ownership of the corporate franchise or right to do business in corporate form, and not upon the exercise of that right, although the success of the business might determine the amount of the tax. (*People ex rel. United States Aluminum Printing Plate Company v. Knight*, *supra*; *Home Insurance Company v. New York*, 134 U. S., 594.) They have had in full measure the element of "absolute and unavoidable demand", which is described by this Court in *Flint v. Stone-Tracy Company* as lacking in the act of Congress under consideration. The New York franchise tax must be paid by every New York corporation, whether it does business within the State or not, as a condition of the right to continue its

existence (*People ex rel. The American Contracting and Dredging Company v. Wemple*, 129 N. Y., 558).

In 1906 the Legislature radically changed the phraseology of the statute so as to read, in part, "for the privilege of doing business or exercising its corporate franchises in this state every corporation, joint-stock company or association, doing business in this state, shall pay", etc.

We shall concern ourselves with only three decisions as to the application of these statutes to receiverships. In *Central Trust Company v. New York City and Northern Railroad Company*, 110 N. Y., 250 (decided prior to 1906), a receiver of the defendant (a domestic corporation) had been appointed in proceedings taken to sequester its property by a judgment creditor, a statutory proceeding; and afterwards another receiver was appointed in an action to foreclose a mortgage upon the property of the corporation. The question involved was whether the State was entitled to payment of the franchise taxes out of funds in the hands of the receiver in foreclosure. Some of these had accrued before, and some after, his appointment. The Court held that the tax was imposed by the statute upon the "franchise"; that the railroad in the hands of the receiver was operated under and by virtue of the "franchise" and that, therefore, as in the case of taxes imposed upon property, the tax was payable out of the property in the hands of the receiver. Nowhere, however, does the Court define, or refer to other decisions defining, the "franchise" upon which the tax is imposed; but the language of the opinion as a whole leaves no doubt that the Court regarded the act as taxing a collection of rights which may or may not have included the corporate franchise proper, but certainly did include the secondary franchise to run the railway. In this view, however, the New York statute was radically different

from the act here in question, which imposes the tax upon the *use* of the corporate franchise proper, but not upon its ownership or upon either ownership or use of secondary franchises.

In addition to the confusion shown in the opinion as to just what the law taxed, the Court laid considerable stress on the doctrine that the State had paramount rights, inasmuch as it "has succeeded to all the prerogatives of the British crown" and had priority of right in the payment of taxes, a doctrine which was repudiated in *Wise et al. v. L. & C. Wise Company*, 153 N. Y., 507. This right has never existed. (*Conrad v. Atlantic Insurance Company of New York*, 1 Peter's, 386; *United States v. The State Bank of North Carolina*, 6 Peter's, 29; *Savings and Loan Society v. Multnomah County*, 169 U. S., 421.)

In the *Central Trust Company* case the Court failed to distinguish between the corporate franchise which the corporation retained, and which was the subject of the tax, and the secondary franchise, which the receiver took and exercised. This same confusion exists in the majority opinion in *New York Terminal Company v. Gaus*, 204 N. Y., 512 (decided subsequent to 1906). The plaintiff, a foreign corporation, had purchased at a judicial sale, under a decree foreclosing a mortgage of the Brooklyn Ferry Company, "all of the property of said Ferry Company, corporeal and incorporeal, save the franchises to be a corporation, . . . subject to all taxes which might be a lien thereon, at the time of sale." It was claimed that certain taxes assessed under the above mentioned act, before and after the appointment of a receiver of the mortgaged property of the Ferry Company, were a prior lien on the property purchased. *The question whether the statutes did or did not impose a tax under the circumstances, was not raised, the only question*



being whether it was a lien on the property sold prior to the lien of the mortgage (pp. 514, 519). Gray, J., said (pp. 515, 516) :

"The tax levied by the Controller by virtue of Section 182 *was a tax upon the franchise*, as distinguished from the property of the corporation. It is imposed, as it declares, upon the privilege of carrying on business and of exercising the corporate franchises. . . . We know from the record that the receiver, who was appointed of this corporation, continued to operate its ferry business and that the tax levied during the two years was upon its *franchise, or privilege, to transact such a business*. . . . As he had no individual interest, but only the official possession of the property, *the receiver could only have operated under the corporate franchise*. . . . The corporation was not dissolved; *its franchise to conduct the ferry business* was in existence and any operation must have been by virtue of that franchise. The right of its officers to operate was taken away, for the time, by the Court and was conferred upon the receiver, as its officer. *Operation, therefore, could only have been under the corporate franchise.*"

This language would seem to show beyond question that the majority Judges were treating the tax not as imposed upon the corporate franchise proper—the right to be a corporation—but upon the secondary or special franchise which the corporation already in existence had acquired to run the ferry business. This secondary franchise of course passed to the receiver, and if taxable at all was as readily taxable in his hands as in those of the corporation itself. The language of this Court in the cases cited has, however, made it absolutely certain that the Federal tax under consideration is not imposed upon such secondary franchises.

We respectfully submit that the opinion of Cullen, *Ch. J.*, in which two of his associates concurred, correctly states the law on this subject. He says (pp. 519, 520, 521) :

"A franchise tax is of an entirely different character from a tax on property. . . . It is levied *on the corporation* for the privilege, as the statute declares, of carrying on its business in a corporate or organized capacity (Tax Law, Secs. 182, 184) ; not of doing business, *but of doing business in a corporate capacity.* . . . The decision below seems to have proceeded on the ground that the right to run a ferry was a corporate franchise granted to the corporation against whose property the mortgage was foreclosed. . . . As a matter of fact many of the ferry privileges, as well as many of the old street railroad franchises in the City of New York, were granted not to corporations but to individuals and their associates. The court below, however, considered that under our statutes individuals cannot own or operate railroads, and that, therefore, the operation of a railroad must be deemed to be under a corporate franchise, and treated a ferry franchise as analogous. If it is possible to settle any question by a uniform current of judicial authority, the settled law is clearly the reverse of the proposition asserted. From the earliest days of railroads corporations owning them have been authorized to mortgage not only the roads but the franchise to maintain and operate them. That necessarily gave to the mortgagees the right to foreclose the mortgage after default, and to the purchasers on the foreclosure the right to operate the road. No legislation could deprive them of that right. But purchasers did not, by the mortgage sale, get the right to operate the road *under a corporate existence.* . . . A receiver appointed in a

foreclosure suit would take nothing by virtue of the corporate existence of the owner of the equity of redemption, but by virtue of the mortgage."

The record in that case appears to have been very incomplete, and did not disclose what franchises the corporation possessed (p. 520) which may have misled the majority of the court; but even if the view taken by Gray, *J.*, be accepted, the *Gaus* case and the New York franchise tax are distinguishable from the case at bar and the Federal tax. Gray, *J.*, said the New York tax was a tax on the franchise; the Supreme Court in the *Flint* case said that the Federal tax was not a tax on the franchise. The New York law makes the tax a paramount lien on the property of the corporation, a fact upon which great stress was laid in both the *Central Trust Company* case and the *Gaus* case. The Federal Act contains no such provision. The New York tax is imposed in advance based on the amount of capital stock employed during the preceding year, and, therefore, the franchise may not actually be exercised or business actually done during the year for which the tax is assessed. The act does not say capital "employed *by* the corporation" and, therefore, its capital in possession of and employed by a receiver might be taxable. The appointment of a receiver would not change the title to the capital. Under the Federal act there is no tax unless business is actually carried on "by such corporation" "in a corporate capacity," and the tax is based on the income "received by it." It is inconceivable that a court would hold that income received and retained by a receiver of the property of a corporation in a foreclosure or general creditors' suit and which was not turned over to the corporation, was received by the corporation,

even though it should hold that the receiver exercised the franchises of the corporation.

*People ex rel. Joline, et al., as Receivers of The Metropolitan Street Railway Company, supra, v. Williams*, was decided without opinion either by the Court of Appeals or by the Court below. There may have been facts in that case which clearly distinguished it from the *Central Trust Company* and *Gaus* cases. In fact, Cullen, *Ch. J.*, so states in the *Gaus* case (pp. 516, 517).

In *Central Trust Company v. Third Avenue Railroad Company*, 186 Fed., 291, it was held that the State of New York was not entitled to a preference (the only point involved in the *Gaus* case) over the Third Avenue mortgage for franchise taxes accruing under this same New York statute. A petition to this Court for a writ of *certiorari* was denied (*The People of the State of New York v. Central Trust Co.*, 223 U. S., 721). Therefore, the decisions of the Federal Courts involving the application of the New York statute to receiverships, are diametrically opposed to the three New York decisions cited by the Government.

Whatever the cases referred to above may have held, we respectfully submit that the principle involved in *McCoach v. Minchill Railroad Company, supra*, that where the corporation does not actually possess and operate its railroads it is not liable for the tax imposed by the Act of 1909, governs the case at bar; and that furthermore these Receivers did not possess or exercise the corporate franchises of these corporations, but that they operated their railroads solely as officers of the Court, and by virtue of the secondary franchises, and that they are not subject to the Act.

**FIFTH POINT.**

**The decisions of the Circuit Court  
of Appeals should be affirmed.**

EVARTS, CHOATE & SHERMAN,  
Solicitors for respondent, Frederick  
W. Whitridge, as Receiver.

DEXTER, OSBORN & FLEMING,  
Solicitors for respondent, Ladd, as  
Receiver.

JOSEPH H. CHOATE, JR.,  
MATTHEW C. FLEMING,  
Of Counsel.

FILED.

OCT 18 1913

JAMES H. McKENNEY,

CLERK.

In the Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 467.

THE UNITED STATES,

*Petitioner,*

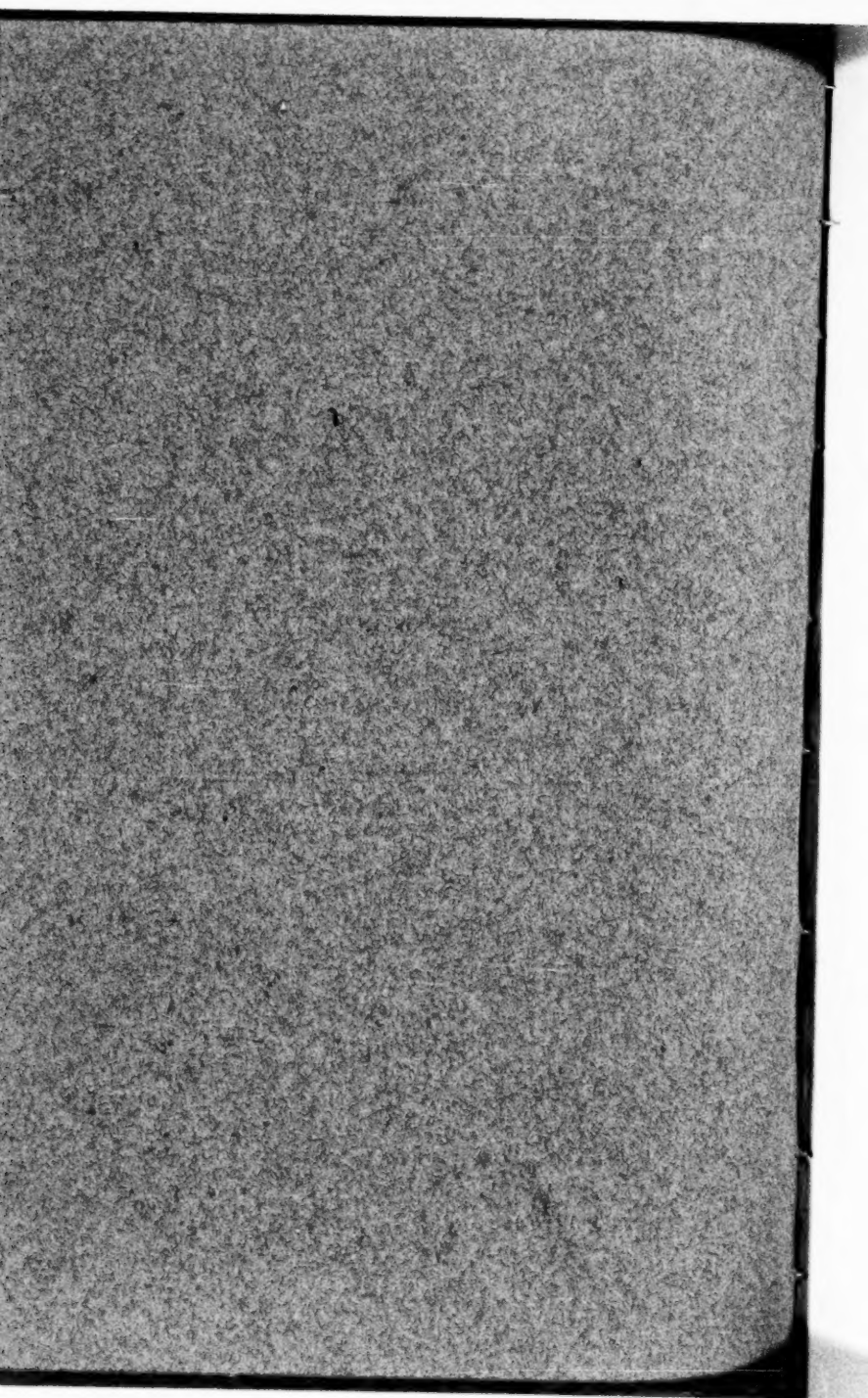
*against*

ADRIAN H. JOLINE AND DOUGLAS ROBINSON, AS RECEIVERS OF  
METROPOLITAN STREET RAILWAY COMPANY ET AL.

BRIEF ON BEHALF OF ADRIAN H. JOLINE AND DOUGLAS ROBINSON,  
AS RECEIVERS OF METROPOLITAN STREET RAILWAY COMPANY.

ARTHUR H. MASTEN,  
ELLIS W. LEAVENWORTH,

*Counsel.*



**In the Supreme Court of the United States.**

OCTOBER TERM, 1913.

No. 467.

THE UNITED STATES,  
Petitioner,

AGAINST

ADRIAN H. JOLINE and DOUG-  
LAS ROBINSON, as Receivers  
of Metropolitan Street Rail-  
way Company, *et al.*,  
Respondents.

**BRIEF ON BEHALF OF ADRIAN H. JOLINE  
AND DOUGLAS ROBINSON, AS RECEIVERS  
OF METROPOLITAN STREET RAILWAY  
COMPANY.**

This matter is before the Court on *certiorari* to the Circuit Court of Appeals for the Second Circuit. The decision under review (198 Fed. 774) affirmed a decree of the District Court denying a petition of the United States for an order to direct the Receivers of Metropolitan



Street Railway Company to make and file returns for the years 1909 and 1910, for Metropolitan Street Railway Company, of its net income, pursuant to Sec. 38 of the Act of Congress of August 5, 1909 (36 Stat. L., 112).

The sole question involved is whether an insolvent corporation, the property of which is in the hands of a receiver appointed by a court of equity, in a judgment creditors' or foreclosure action, is "carrying on or doing business" within the meaning of the Act, and whether such receiver is obliged to file a return, under the Act, of his income realized while acting as an officer of the Court.

#### **The Facts.**

Metropolitan Street Railway Company is a corporation organized under the laws of the State of New York. Receivers were appointed for this company in a general creditors' suit in the Circuit Court of the United States for the Southern District of New York by order filed October 1, 1907 (Petitioners' Exhibit B, Rec., p. 14), and the same receivers were subsequently appointed for the company in three foreclosure suits in the same court by orders filed October 9, 1907, November 19, 1907, and March 17, 1908, respectively (Petitioners' Exhibits D, E and F, Rec., pp. 18-25). These proceedings were under consideration by this Court in *Re Metropolitan Receivership*, 208 U. S., 90. The Receivers took possession of the

property of the Company on October 1, 1907, and operated it, remaining in sole possession thereof, until the close of the year 1911 (Rec., p. 9). By order filed October 9, 1907, the company, its officers, agents, directors and employees, were enjoined from interfering in any way with the possession or management of the property by the receivers (Rec., p. 17). By order filed November 9, 1907, the company was adjudged insolvent (Rec., p. 7).

At the time when this proceeding was brought (November, 1911) a decree of foreclosure and sale had been entered upon mandate of the Circuit Court of Appeals in the third of the above-mentioned suits, and an appeal was pending from a supplemental decree of foreclosure and sale entered April 6, 1910, in the fourth of the above-mentioned suits (Rec., p. 32). On January 1, 1912, the Receivers delivered possession of the property of Metropolitan Street Railway Company to the purchasers at the foreclosure sales.

For each of the years 1909 and 1910 Metropolitan Street Railway Company, by its vice-president and treasurer, made a return to the Collector of Internal Revenue for the Second District upon a blank form provided for the purpose in which it was stated that during the year in question "the property of this company was in the hands of receivers appointed by a court of competent jurisdiction, who were in charge of its operations; the officers of the company are therefore unable to make this report" (Rec., pp. 25-

28). Under instructions of the court the Receivers made no returns (*Penn. Steel Co. vs. N. Y. City Ry. Co.*, 176 Fed., 471, 477).

#### The Pleadings.

The petition (Rec., p. 6), alleges the organization and corporate existence of Metropolitan Street Railway Company and that

"in the years 1909 and 1910 *it was engaged in business* in the City, County and State of New York."

It is, however, subsequently alleged (p. 9) that Messrs. Joline and Robinson immediately upon their appointment as Receivers, took possession

"of all the assets and property of the said Metropolitan Street Railway Company of every kind and nature whatsoever and have ever since remained in possession thereof and have acted and continued to act during the years 1909 and 1910 and ever since pursuant to the terms of each of the said orders appointing them such receivers since the respective dates of entry thereof; and during the years 1909 and 1910 and ever since, *the business of the said Metropolitan Street Railway Company has been done, performed and carried on by the said Adrian H. Joline and Douglas Robinson as such receivers, their agents, employees, etc., and by them alone.*"

It is further alleged that the Metropolitan Street Railway Company became subject by the provisions of Section 38 of the Act of Congress of

August 5, 1909, to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, and the petition then charges (p. 10):

"That by virtue of the appointment in each of the above-entitled actions of Adrian H. Joline and Douglas Robinson as Receivers as aforesaid of the said Metropolitan Street Railway Company, its assets, property, etc., *the said receivers took the place of the directors and officers of the said company during the pendency of the above-entitled actions to the same effect and with the same liabilities, obligations and duties as were and are imposed by law upon such directors and officers of the said Metropolitan Street Railway Company and more particularly by the provisions of said section.*"

The answer admits the possession and operation of the properties of the Metropolitan Street Railway by the Receivers pursuant to the orders of the Court by which they were appointed, but puts in issue the above quoted allegations of the petition (Rec., p. 31).

# I.

**The tax is imposed solely upon the privilege of doing business in a corporate capacity. This is apparent from the language of the Act and has been definitely established by recent decisions of this Court.**

Section 38 (36 Statutes L., 112) provides:

"That every corporation \* \* \* organized for profit and having a capital

stock, represented by shares \* \* \* now or hereafter organized under the laws of the United States or of any State or Territory of the United States \* \* \* or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States \* \* \* shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation \* \* \* equivalent to one per centum upon the entire net income over and above \$5,000 received by it from all sources during such year \* \* \*."

This means that the tax imposed by the Act is a tax, not upon business *per se*, but upon the right to do business in a particular manner and with particular advantages, to wit, in a corporate capacity, and with the advantages which inhere in corporate organizations. If business is not done in a corporate capacity, no tax is payable in respect thereto. It is not a tax upon property or franchises or income. Where income is actually received but no corporate business is done, the tax is not payable.

*Flint v. Stone Tracy Company*, 220 U. S., 107;

*Zonne v. Minneapolis Syndicate*, 220 U. S., 187;

*McCoach v. Minchill and Schuylkill Haven R. R. Co.*, 228 U. S., 295.

## II.

**The transactions of the Receivers in operating the Metropolitan System during the two years in question involved no exercise of the right to do business in a corporate capacity.**

That the Receivers acquired no interest in the right of the Metropolitan Street Railway Company to be a corporation is not open to question. The corporation continued to exist. It could hold corporate meetings and elect officers. It retained title to its property, the Receivers being vested with no interest therein but acting merely as its custodians for the Court. (*Quincy Railway v. Humphreys*, 145 U. S., 82.)

It was, however, restrained by the order appointing Receivers from interfering in any way with their management and control of the property. This provision would seem conclusively to dispose of the claim that the administration of the Receivers could involve in any sense the transaction of business in a corporate capacity.

The Government claims, however, that the corporation, although expressly restrained from taking part in the operation of the road, must be regarded as exercising corporate powers because the Receivers could not lawfully have availed of its franchises in the streets. It is pointed out that the Metropolitan Company acquired not only the right to be a corporation but to be a corporation for the purpose of operating

street railroads on certain streets. It is argued (Petitioner's brief, p. 4):

"Who was carrying on this business if not the corporation? The Receivers could not lawfully do so either as individuals or as officers of the Court. The Court itself could not do so, except by virtue of the jurisdiction it acquired over these corporations having these franchises which alone made such business lawful or possible. It follows by the method of exclusion that it was the corporations who were carrying on the business."

The weakness of this argument is that it fails to recognize the difference between a franchise to exist and a franchise to operate, and it overlooks decisions to the effect that there is no inherent objection to the operation of a railroad franchise by individuals. It is well settled that a corporate existence is not an absolute prerequisite to lawful operation of a railway. This Court said in *Memphis, &c., Railroad Company v. Commissioners*, 112 U. S., 609, 619:

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it and the franchise of maintaining and operating it as such; and the corporate existence is not essential

to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation."

To the same effect are

*Schurz v. Cook*, 148 U. S., 397, 409;

*Village of Phoenix v. Gannon*, 195

N. Y., 471.

Nor can the position of the Government be sustained on any theory of trusteeship or agency. It is argued (Petitioner's brief, p. 6):

"But it is submitted that in every substantial sense the income received and disbursements made by the Receiver are those of the corporation itself. The Receiver takes the income as a trustee, applies it first to the debts of the corporation and holds the surplus for the corporation. Any net income over and above the expenses, debts, etc., is the equitable property of the latter."

This argument is without force because the question at issue does not turn upon the ultimate rights of the corporation. The right of the Government to collect the tax depends upon whether the Company itself was actually "engaged in doing business." The fact that it may have an equitable or reversionary right to any surplus assets remaining after the termination of the



receivership is immaterial. This is clearly established by the Zonne case (*supra*), in which the corporation sought to be taxed had leased its property for a term of years. This Court said (p. 191) that it

“was not engaged in doing business within the meaning of the Act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold.”

Furthermore, the difference between the business methods of the receivership and those of the corporation itself is so fundamental as absolutely to preclude the application of any theory of agency.

The Receiver represents none of the parties to the cause, but acts under the sole direction of the Court.

“The contracts he makes or the engagements into which he enters from time to time under the order of the Court are, in a substantial sense, the contracts and engagements of the Court. The liabilities which he incurs are liabilities chargeable upon the property under the control and in the possession of the Court and are not the liabilities of the parties. They have no

authority over him and cannot control his acts."

*Atlantic Trust Co. vs. Chapman,*  
208 U. S., 360, 375.

The corporation cannot be deemed to transact business within the meaning of the Act when its property is being operated under conditions which may make a compliance with the requirements of the Act impossible. For example, the corporation in making its return under the Act is entitled to deduct from its gross income the amount of interest paid on its bonded indebtedness. Receivers, on the other hand, rarely pay interest on bonded indebtedness except in the case of underlying liens and therefore would not receive the benefit of this deduction. The corporation is also entitled to deduct from its gross income the amount of current operating expenses. In the case of a receivership such expenses as salaries, counsel fees and fees of Special Masters, are often deferred for several years until the termination of the receivership and then may be paid either from income or from the *corpus* of the property, as occasion may require. It might, therefore, readily occur that an insolvent corporation in the hands of receivers would be subject to a heavier tax than a going concern on the same gross income. Such differences as these are not to be considered mere "administrative details," as counsel for petitioner has suggested. They go to the root of the question involved and show

conclusively that the Court below correctly held that no process of construction would warrant the inclusion of the Receivers within the purview of the Act.

### III.

**The New York decisions cited in Petitioner's brief are not authoritative.**

It is conceded by the Government that they are not binding on this Court, but it is urged that they are entitled to weight on the question of whether a corporation organized under State laws is still doing business under its State charter, although in the hands of a Receiver (Petitioner's Brief, p. 12). We deem it unnecessary to discuss these authorities at any length in view of the recent decisions of this Court on the particular statute now in question. It may be pointed out, however, that each of the cases cited presents features which detract from its weight as an authority on the present issue.

The tax involved in *Central Trust Company v. New York City and Northern Railroad Company* (110 N. Y., 250) was held by this Court (*Home Insurance Company vs. New York*, 134 U. S., 594) to be a tax upon "the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which when incorporated the Company may exercise."

This distinction was not discussed in the Central Trust Company case, the chief point argued being whether or not the franchise taxes then in question were liens upon the property of the corporation. The decision of the Court was to the effect that the Receiver should pay the tax because he had taken possession of all the property of the corporation and operated its trains, thus using the franchise which had been conferred by the State upon the company. To the extent, therefore, that the case treats the franchise in question as the secondary franchise instead of the mere right to do business in a corporate capacity, it is not in accord with the Home Insurance case in this Court.

The decision in *New York Terminal Company vs. Gaus*, 204 N. Y., 512, followed the Central Trust Company case and was by a divided court.

#### IV.

**The decision and decree below should be affirmed.**

Washington, October 14, 1913.

MASTEN & NICHOLS,

Solicitors for Respondents,  
Joline and Robinson as  
Receivers.

ARTHUR H. MASTEN,

ELLIS W. LEAVENWORTH,

Of Counsel.

UNITED STATES *v.* WHITRIDGE, RECEIVER OF  
THE THIRD AVENUE RAILROAD COMPANY.

UNITED STATES *v.* JOLINE AND ROBINSON,  
RECEIVERS OF THE METROPOLITAN STREET  
RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT.

Nos. 466, 467. Argued October 21, 1913.—Decided November 10, 1913.

The Corporation Tax Law of 1909 was adopted before the ratification of the Sixteenth Amendment and imposed an excise tax on the doing of business by corporations, and not in any sense a tax on property or upon income merely as such. *Flint v. Stone-Tracy Co.*, 220 U. S. 107.

The Corporation Tax Law does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation.

The act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112, does not impose a tax upon the income derived from the management of corporate property by receivers under the conditions of this case.

193 Fed. Rep. 289; 198 Fed. Rep. 774, affirmed.

THE facts, which involve the construction of the Federal Corporation Tax Act and the determination of whether the same imposed a tax upon the income derived from the management of corporate property by receivers appointed by the court, are stated in the opinion.

*Mr. Assistant Attorney General Graham* for the United States:

An insolvent corporation, operated by a receiver duly appointed by a court of equity, is, while in the hands of such receiver, "doing business" within the meaning of § 38 of the Corporation Tax Act of August 5, 1909, 36 Stat. 11, 112.

231 U. S.

Opinion of the Court.

Such corporation being engaged in business, the receiver thereof is obliged to make the return provided for in the statute. *Central Trust Co. v. New York City*, 110 N. Y. 250, 256; *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 145; *Home Ins. Co. v. New York*, 134 U. S. 594; *In re Metropolitan Ry. Receivership*, 208 U. S. 90; *Morrison v. Forman*, 177 Illinois, 427; *New York Terminal Co. v. Gaus*, 204 N. Y. 512, 515; *Joline v. Williams*, 200 N. Y. 528; *P. & R. R. Co. v. Commonwealth*, 104 Pa. St. 80.

*Mr. Joseph H. Choate, Jr.*, with whom *Mr. Matthew C. Fleming* was on the brief, for respondents in No. 466.

*Mr. Arthur H. Masten*, with whom *Mr. Ellis W. Leavenworth* was on the brief, for respondents in No. 467.

MR. JUSTICE PITNEY delivered the opinion of the court.

These cases were heard together in the District Court and in the Circuit Court of Appeals (*sub nom. Pennsylvania Steel Company v. New York City Railway Company*, 193 Fed. Rep. 286; 198 Fed. Rep. 774). They were argued together in this court, and may be disposed of in a single opinion.

In the years 1909 and 1910 certain lines of street railway in the City of New York, that may be conveniently designated as the Third Avenue system, were in the hands of the respondent Whitridge, as receiver, under orders made in the year 1908 by the Circuit Court of the United States for the Southern District of New York in actions pending therein against the several proprietary companies. One of these actions was a foreclosure suit; the others were creditors' actions based upon the insolvency of the respective companies. The powers conferred upon the receiver did not vary in any respect now

material, and so a recital of the substance of one of the orders will suffice as an example. This order constituted Whitridge receiver of all the railroads and other property of the company, including tracks, cars and other rolling stock and equipment, easements, privileges and franchises, and the tolls, earnings, income, rents, issues and profits thereof, with authority "to run, manage, and operate the said railroads and properties, to collect the rents, income, tolls, issues and profits of said railroads and property, to exercise the authority and franchises of said defendant, and discharge its public duties, acting in all things subject to the supervision of this court." By the same order the officers, agents and employés of the company were required to turn over and deliver to the receiver all of the said property in their hands or under their control, and the company was enjoined from interfering in any way with his possession or management.

In the same years (1909 and 1910) certain other lines of street railway in the City of New York, which may be described as the Metropolitan system, were in the possession of the respondents Joline and Robinson as receivers, appointed in the year 1907 by the Circuit Court of the United States for the same district, in several actions therein pending against the corporations which were owners of these lines. The orders appointing these receivers contain provisions substantially similar to those already recited. (See *In re Metropolitan Railway Receivership*, 208 U. S. 90, 93-96.)

In the year 1911, petitions were filed in the Circuit Court in behalf of the United States praying for orders directing the receivers to make returns of the net income of the respective railway corporations for the years 1909 and 1910, to the collector of internal revenue, in the manner required by the provisions of the Corporation Tax Law. (Tariff Act of August 5, 1909, § 38, 36 Stat., c. 6, pp. 11, 112-117.)

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The applications were resisted by the receivers on the ground that the respective corporations did not during the years 1909 and 1910 carry on any business in respect of the property that was in their hands as such receivers; that they as such receivers managed, controlled and operated the same, and carried on all the business in respect thereto, and received all the income arising therefrom, not acting in place of the directors and officers of the respective companies, but as officers of the court; and that they were therefore not subject to the provisions of the act.

Jurisdiction of the controversy having been transferred to the District Court by virtue of the new Judicial Code, § 290, 36 Stat. 1167, that court sustained the contention of the receivers (193 Fed. Rep. 286) and the Circuit Court of Appeals affirmed this decision (198 Fed. Rep. 774). The cases are brought here by writs of certiorari.

As repeatedly pointed out by this court, the Corporation Tax Law of 1909—enacted, as it was, after Congress had proposed to the legislatures of the several States the adoption of the Sixteenth Amendment to the Constitution, but before the ratification of that Amendment—imposed an excise or privilege tax, and not in any sense a tax upon property or upon income merely as income. It was enacted in view of the decision of this court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, which held the income tax provisions of a previous law (Act of August 27, 1894, 28 Stat., c. 349, pp. 509, 553, § 27, etc.) to be unconstitutional because amounting in effect to a direct tax upon property within the meaning of the Constitution and because not apportioned in the manner required by that instrument.

As was said in *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 145, respecting the act of August 5, 1909—"The tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or in-



surance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above \$5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity." This interpretation was adhered to and made the basis of decision in *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, and *McCoach v. Minehill Railway Co.*, 228 U. S. 295, 300.

A reference to the language of the act <sup>1</sup> is sufficient to

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<sup>1</sup> SEC. 38. That every corporation . . . organized for profit and having a capital stock represented by shares . . . organized under the laws of the United States or of any State . . . and engaged in business in any State . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation . . . equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations . . . subject to the tax hereby imposed. . . .

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation . . . received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties. . . .

And on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations . . . subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation . . . has its principal place of business. 36 Stat. 112.

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show that it does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income.

And we are unable to perceive that such receivers are within the spirit and purpose of the act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges.

Without amplifying the discussion, we content ourselves with saying that, having regard to the genesis of the legislation, the constitutional limitation in view of which it was evidently framed, the language employed by the lawmaker, and the reason and spirit of the enactment, all considerations alike lead to the conclusion that the act of 1909 did not impose a tax upon the income derived from the management of corporate property by receivers, under such conditions as are here presented.

*Decrees affirmed.*